HUMAN RIGHTS
AND THE RULE OF LAW IN RWANDA:

RECONSTRUCTION OF A FAILED STATE

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Declaration

I, the undersigned, hereby declare that the work contained in this dissertation is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

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Abstract

Human rights denials have more characterised Rwandan history than their promotion and protection. When the Rwandan State emerged from Tutsi domination and colonialism, many Rwandans hoped that the era of liberty had at least dawned. But the reality has been a total disappointment and replicas of earlier abuses have emerged, despite the ratification by Rwanda of most international human rights instruments. This dissertation is premised on the assumption that Rwanda has failed as a democratic constitutional State, and the whole socio-economic-political system has gone wrong.

Chapter one argues that disequilibrium was built into the Rwandan system before colonisation and evangelisation. There was a 'consensus' that Tutsis were a superior minority race, able to govern and dominate, well organised and accepted by their Hutu subjects. The colonists and the Catholic Church exploited this injustice for their indirect rule. In a world evolving towards the international human rights system, this had a very precarious foundation in Rwanda. Indeed, poor management of changes due to evangelisation, education and market economy led to the denial of human dignity. It exacerbated division in favour of Hutus rather than reinforcing national unity.

Chapter two considers the Hutu regime as a failure of a democratic constitutional State in the post-colonial era, despite the promise to serve the interests of all Rwandans through democracy and respect for human rights. In a one-party State, a handful of Hutus have monopolised power and resources. The institutional infrastructure for the management of the State and protection of human rights was set up to safeguard the interests of the ruling group only and oppress the rest of the population. The Hutu government, particularly, took revenge on Tutsis that they killed, forced into exile and denied access to public affairs. Hutu opponents, real or imaginary, and people from other regions than that of the President were also denied such access. Separation of powers was purposely just a theory, whence a non-independent judiciary, interference of the executive in the functioning of other branches of government and abuse of legislative power became the reality. In order to perpetuate the ruling group's hegemony, civil society was hindered, while states of emergency were used to deny the right to life, liberty and the security of the person. Many other rights were also denied regardless of whether the denial was a legacy of the past or just a result of the undemocratic nature of the State and the underdevelopment of the country. The Hutu regime's failure to promote national unity resulted in a genocide which took the lives of many Tutsis and Hutus.

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Whereas the current Tutsi government presented itself as committed to democracy and human rights, Chapter three argues that it was a *mutatis mutandis* replica of the Hutu rule. Indeed, the State system and resources have been captured by a group of Tutsis while other Tutsis have been left without hope and Hutus have become second-class citizens, whence justice and national unity are in jeopardy. By avoiding to tackle the fundamental issue of nation-statehood, the United Nations have failed to maintain peace and security. The failure to condemn Ugandan aggression against Rwanda, the forced repatriation of refugees, and the non-prosecution of Tutsis involved in crimes against humanity have proved the demise of international law and the maintenance of the culture of impunity in Rwanda.

The author nonetheless argues that respect for human rights and establishment of the rule of law are still possible through a process of reconciliation and reconstruction.

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Opsomming

Die geskiedenis van Rwanda word meer deur die miskenning van menseregte as erkenning en beskerming daarvan gekenmerk. Toe die Rwandese Staat onder Tutsi oorheersing en kolonialisme uit verrys, het baie Rwandese gehoop dat die tydperk van vryheid ten minste aangebreek het, maar die werklikheid was algeheel teleurstellend en weergawes van vroeëre misbruike het weer tevore getree, ten spyte daarvan dat Rwanda die meeste internasionale werktuie vir menseregte bekragtig het. Hierdie verhandeling berus op die aanname dat Rwanda as 'n demokratiese grondwetlike staat misluk het en dat die sosio-ekonomies-politieke stelsel geheel-en-al verkeerd geloop het.

Hoofstuk een argumenteer dat 'n wanbalans voor die kolonisasie en evangelisasie van die land reeds in die Rwandese stelsel ingebou is. Daar was 'konsensus' waarvolgens Tutsis beskou is as 'n superieure minderheidsras wat in staat was om te regeer en te oorheers, wat goed georganiseer was en deur hul Hutu onderdane aanvaar is. Die koloniste en die Katolieke Kerk het hierdie onreg ten voordeel van hul indirekte heerskappy uitgebuit. In 'n wêreld wat op pad was na 'n internasionale menseregtestelsel was die grondslag wat hiervoor in Rwanda gelê is uiters onseker. Swak bestuur van veranderinge wat deur evangelisasie, opvoeding en 'n mark-ekonomie teweeggebring is, het in werklikheid tot miskenning van menseregte gelei. Dit het skeiding tot voordeel van die Hutus vererger, eerder as om nasionale eenheid te versterk.

Hoofstuk twee kyk na die Hutu regime as 'n mislukte demokratiese konstitusionele staat in die postkoloniale era, ten spyte van die belofte om die belange van alle Rwandese deur demokrasie en eerbied vir menseregte te dien. In die eenpartystaat het 'n handjievol Hutus die mag en hulpbronne gemonopoliseer. Die institusionele infrastruktuur vir die bestuur van die Staat is opgestel om die belange van die heersersgroep te beveilig en die res van die bevolking te onderdruk. Die Hutu regering het hul veral op Tutsis gewreek deur hulle te vermoor, tot ballingskap te dryf en hul toegang tot openbare sake te weier. Hutu teenstanders, werklik of vermeend, en mense vanaf ander streke as die waarvan die President afkomstig was, is ook van sodanige toegang weerhou. Die verspreiding van mag was doelbewus niks meer as teoreties nie, vandaar die nie-onafhanklikheid van die regbank, inmenging by die funksionering van ander vertakkings van die regering deur die uitvoerende gesag en die misbruik van die wetgewende gesag. In die poging om die regerende groep se hegemonie te bestendig, is die burgerlike samelewing belemmer en is daar van noodtoestande gebruik gemaak om die reg tot lewe, vryheid en die veiligheid van die persoon aan te tas. Baie ander regte is ook geweier, ongeag of die weiering daarvan as gevolg van die nalatenskap van die verlede of die ondemokratiese aard van die Staat en die onderontwikkeldheid van die land

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moontlik was. Die feit dat die Hutu regering ten opsigte van die bevordering van nasionale eenheid misluk het, het gelei na 'n menseslagting wat die lewens van vele Tutsis en Hutus geëis het.

Terwyl die huidige Tutsi regering homself as verbonde tot demokrasie en menseregte voordoen, argumenteer Hoofstuk drie dat die regering bloot 'n *mutatis mutandi* weergawe van die Hutu regering is. In werklikheid is die staatsisteem en die hulpbronne deur 'n groep Tutsis gebuit, die res van die Tutsis is sonder hoop gelaat en die Hutus is tot tweederangse burgers gemaak, wat vrede en sekuriteit in gevaar stel. Met die ontwyking van die grondliggende kwessie van nasieskap, het die Verenigde Volke ten opsigte van die handhawing van vrede en sekuriteit gefaal. Die onvermoë om Uganda se aggressie teenoor Rwanda te verdoem, die gedwonge repatriasie van vlugtelinge en die gebrek aan vervolging van Tutsis wat skuldig is aan misdade teen die mensheid het die afstanddoening van internasionale wetgewing en die ondersteuning van die kultuur van straffeloosheid in Rwanda bewys.

Desnieteenstaande argumenteer die skrywer dat respek vir menseregte en die instelling van regsoewereiniteit nog steeds deur middel van 'n proses van versoening en heropbouing in Rwanda moontlik gemaak kan word.

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List of abbreviations

ACLU:	American Civil Liberties Union.
AGER:	Association Générale des Etudiants Rwandais (General Association of Rwandan Students).
AGEUNR:	Association Générale des Etudiants de l'Université Nationale du Rwanda (General Association of Students of the National University of Rwanda).
ANC:	African National Congress.
APADEC:	Association pour la Promotion de la Démocratie (Association for the Promotion of Democracy).
APLA:	Azanian People's Liberation Army.
APROBAMI:	Association pour la Protection du Régime Monarchique (Association for the Protection of the Monarchic Regime).
APROSOMA:	Association pour la Promotion de la Masse (Association for the Promotion of Masses).
AREDETWA:	Association pour le Rétablissement des Twa (Association for the Re-establishment of Twas).
ARP:	Agence Rwandaise de Presse (Rwandan Press Agency).
AWB:	Afrikaner Weerstands Beweging (Afrikaner Resistance Movement).
AZAP:	Agence Zairoise de Presse (Zairian Press Agency).
B.O:	Bulletin Officiel (Official Bulletin).
BLA:	Black Local Authorities.
BORU:	Bulletin Officiel du Ruanda-Urundi (Official Bulletin of Ruanda-Urundi).
CAST:	Civic Associations of the Southern Transvaal.
CDR:	Coalition pour la Défense de la République (Coalition for the Defense of the Republic).
COPRI:	Copenhagen Peace Research Institute.
ed.:	Edition.
Eds.:	Editors.
FAR:	Forces Armées Rwandaises (Rwandan Armed Forces).
FDC:	Forces Démocratiques pour le Changement (Democratic Forces for the Change).
FRD:	Forces de Résistance pour la Démocratie (Resistance Forces for Democracy).
HRLJ:	Human Rights Law Journal.

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Ibid.:	Ibidem.
IFP:	Inkatha Freedom Party.
ILO:	International Labor Organization.
IMF:	International Monetary Fund.
J.O:	Journal Officiel (Official Gazette).
JMRND:	Jeunesse du Mouvement Révolutionnaire National pour le Développement (Youth of the Revolutionary Movement for the Development).
MDR:	Mouvement Démocratique Républicain (Republican Democratic Movement).
Mgr:	Monsignor.
MK:	Umkhonto we Sizwe (military wing of the ANC).
MPR:	Mouvement Populaire de la Révolution (Popular Movement of the Revolution).
MRAC:	Musée Royal de l'Afrique Centrale (Royal Museum of Central Africa).
MSM:	Mouvement Social Muhutu (Social Movement of Hutus).
n.d.:	No date.
n.p.:	No place.
NAACP:	National Association for the Advancement of Colored People.
NGO:	Non-government organization.
NMOG:	Neutral Military Observation Mission.
No.:	Number.
NP:	National Party.
OAU:	Organization of African Unity.
ORINFOR:	Office Rwandais d'Information (Rwandan Office of Information).
ORU:	Ordonnance du Ruanda-Urundi (Order of Ruanda-Urundi).
p.:	Page.
PAC:	Pan Africanist Congress.
PALIR:	Peuple en Armes pour la Libération du Rwanda (Armed People for the Liberation of Rwanda).
PARMEHUTU:	Parti pour l'Emancipation de la Masse Hutu (Party for the Emancipation of Hutu Masses).
PDC:	Parti Démocrate Chrétien (Christian Democratic Party).
PL:	Parti Libéral (Liberal Party).
PSD:	Parti Social Démocratique (Democratic Social Party).
RADER:	Rassemblement Démocratique Rwandais (Rwandan Democratic Rally).
RANU:	Rwandan Alliance for National Unity.

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Res.:	Resolution.
RPA:	Rwandan Patriotic Army.
RPF:	Rwandan Patriotic Front.
SABC:	South African Broadcasting Corporation.
SACP:	South African Communist Party.
SOMIRWA:	Société Minière du Rwanda (Rwanda Mining Company).
SWAPO:	South-West African People's Organization.
TRAFIPRO:	Travail, Fidélité, Progrès (Work, Fidelity, Progress).
TVR:	Télévision Rwandaise (Rwandan Television).
UCL:	Université Catholique de Louvain (Catholic University of Louvain).
UDF:	United Democratic Front.
UHURU:	Union des Hutus du Ruanda-Urundi (Union of Hutus of Ruanda-Urundi).
UN:	United Nations.
UNAFREUROP:	Union des Réfugiés Rwandais d'Europe (Union of Rwandan Refugees in Europe).
UNAR:	Union Nationale Rwandaise (National Union of Rwanda).
UNGA:	United Nations General Assembly.
UNHCR:	United Nations High Commission for Refugees.
UNO:	United Nations Organization.
UNR:	Université Nationale du Rwanda (National University of Rwanda).
UPRONA:	Union pour le Progrès National (Union for National Progress).
URAMA:	Urunana Ruharanira Amajyambere y'Abanyarwandakazi (Rwandan Women in Unison for Development).
US:	United States.
v.:	versus.
vol.:	Volume.

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General introduction

From the inherent dignity and equality of all human beings from birth, it follows that fundamental rights and freedoms of the human being are important to society and must be legally inalienable and imprescriptible.[1] The State can regulate but not abrogate them.

On the basis of these premises, the international community of states and non-state actors like non-governmental organisations (NGOs) have gradually been giving moral, political and legal force to the content of such fundamental rights and freedoms and to their relationship to the rule of law. In great part, though, this effort has proceeded only by linking the cause of human rights to world peace. Thus, when the United Nations Organisation whose job is ultimately to promote and maintain peace was created, its assignment was "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small"[2] as an objective integral to keeping the peace and in recognition of the argument that democratic states tend to cause fewer wars than do abusive and absolutist regimes.

This dissertation examines why and in which ways international human rights standards and the rule of law have not been given effect and protection both on paper and in practice in Rwanda.

It is the author's contention that human rights are not deep-rooted in Rwanda, whence the failure of international human rights standards both in theory and in practice. First, the pre-colonial and colonial legacies of absolutism and unfair and unequal treatment among Rwandan people have had an enormous impact on human rights in the post-independence period. Second, successive governments have not been committed to the promotion and protection of human rights. Third, the scope and content of rights guaranteed by Rwandan laws have been inadequate. Fourth, the institutional infrastructure for the protection and enforcement of human rights has been ineffective. Lastly, several social, economic, cultural and political factors have had a negative impact on human rights.

Rwanda, formerly Ruanda as part of Ruanda-Urundi under Belgian colonisation, is a three-ethnic country of almost seven million people, located in the Great Lakes region of central Africa. It attained its independence from Belgium in 1962 under the leadership of President Grégoire Kayibanda and

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[1] Villan Duran, C., The Universal Declaration of Human Rights: a landmark history - a vision for the future, (Strasbourg: International Institute of Human Rights, 1998), p. 2.

[2] United Nations Charter, Preamble and Article 55.

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his Party, PARMEHUTU (Parti pour l'Emancipation de la Masse Hutu). While the colonial authorities based their rule on highly centralised, bureaucratic and quasi-military structures, the constitutions introduced at independence were founded on the principles of Western-European constitutionalism, with its characteristics of separation of powers, checks and balances, limited government, and the protection of individual rights and of minorities. In short, the price paid for independence was the acceptance by the new State of the principles of European liberal democracy as it emerged during the nineteenth century. This is a strikingly common feature of the transition from colonial rule to independent statehood in Africa.[3] In fact, Rwanda's self-government Constitution provided for a multi-party system of government, a bill of rights, an independent judiciary and formal separation of powers of government. However, these principles were abandoned soon after independence in favour of the introduction of an executive presidency and of single party rule incompatible with human rights. The author argues that the attitude of Rwandan leaders after independence did not so much constitute a rupture with the colonial past they rejected but rather its continuation and aggravation.

Rwanda reverted back to the instituting of multi-party rule in June 1991, as a result of international pressure and claims from internal forces. A new Constitution replacing the one-party Constitution came into effect on 10 June, 1991, but a multi-party democracy failed to come into being: there have been no multi-party elections since 1963.

There are many reasons why a case study of Rwanda is important. First, Rwandans live in one small territory, have one single culture and speak one language, but politically tear one another apart. The study of Rwandan nation- and state-building provides an opportunity to demonstrate how the politico-social organisation and the polarisation and politicization of ethnicity during the pre-independence period instilled a culture of inequality and political exclusion among Rwandans. In particular, Belgian's misuse of its mandate powers over Rwanda under the League of Nations (supposed to prepare Rwandans for self-government) left Rwanda with a destabilised and feared state apparatus at the time of independence.

Not surprisingly, Rwanda has experienced ongoing political instability, like many other countries in Africa. From 1962 to 1999 it was ruled by five Presidents with weak and unstable political machineries leading to assassinations, ethnic civil wars and routine abuse of - or disregard for -

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[3]Panter-Bryck, S.K "Quatre constitutions Africaines, deux modèles" *in: Dynamiques et finalités des droits africains, Paris, 1980, p. 434.* Gickel, J., Le présidentialisme négro-africain, p. 701. Cadoux, C., "Le statut et les pouvoirs des chefs d'Etat et de gouvernements", *in: Les institutions constitutionnelles des Etats d'Afrique francophone et de la République Malgache, (Paris: Pénant, 1978), p. 69.*

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human rights. In particular, this instability resulted in the frequent imposition of states of emergency, which proved to be periods of legalised disregard of basic human rights. These repeated states of emergency and other forms of instability resulted in repeated ethnic hunting and cycles of revenge that culminated in 1994 in the widespread killing of Tutsis by Hutus. Most recently, and precisely because of the gravity of the genocide, the human rights practice of the new Tutsi government has not received the scrutiny given to the former Hutu government and to other countries such as Burundi, Congo, Kenya, and Nigeria. As a result, Hutus have been regarded as bad guys and Tutsis as good guys. The Tutsi government has considered itself to be, and has been viewed by the international community, as a benevolent liberator struggling against impossible odds to do what is best for its people. We see this oversimplified view contributing to the United Nations' efforts to prosecute the perpetrators of genocide and other gross human rights abuses in 1994 in the fact that, to date, only Hutus have been prosecuted.

The foregoing account shows that human rights have no roots in the Rwandan society, that the failure of the State itself has resulted in the lack of commitment to their promotion and protection, and that the situation is likely to remain chaotic in the absence of radical changes.

Certain analysts describe the war and the genocide as a result of the hatred Hutus have for Tutsis.[4] Such an approach does not consider the fact that the war and the genocide are episodes of the struggle for the control of political power that has been shaking the Rwandan society since around the sixteenth century. In fact, to date the bad governance has manifested itself through exclusion, discrimination, restriction or preference based on ethnic affiliation or regional origin. As a consequence, human rights and fundamental freedoms have been denied in political, economic, social and other domains of public life regardless of whether the majority Hutu or the minority Tutsi have been in power. The conditions of equality have never been adequate. In that country with limited resources, the struggle for power has often hidden the struggle for access to those resources as well as the domination of mechanisms and channels for their social distribution. Ethnic bipolarisation and automatic reflexes of solidarity developed by successive oligarchies have been factors of permanent tension within the society. Ethnicity and regionalism have always been the main evils at the origin of the deviation in the governance of Rwanda. They have expressed themselves through egocentric appropriation of political power and national resources and have been the source of chaos and of the disintegration of the country. Therefore, the respect for human rights and fundamental freedoms requires an unbiased critical analysis of the socio-economic-political history of

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[4] Shyaka, A., La philosophie du génocide, Bukavu: Rset, 1995; Karegyeya, T., "Du sang a coulé', *Rwandanet*,14 July 1996.

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Rwanda in order to make proposals for a politically realistic and lasting solution.

Studies exist that are descriptive of power and law in Rwanda while others are limited to a few isolated issues of human rights violation. While *Reyntjens,*[5] *Nkundabagenzi,*[6] *Lemarchand*[7] and others[8] describe how power was exercised and how various institutions were put in place by holders of power, this dissertation makes a critical analysis of how and why those holders of power and their successors failed, through those institutions, to promote and protect human rights in the country. From the "how" and "why", a "what" is also dealt with, which prepares the reader for legal and doctrinal understanding and recommendations for the amelioration of the problem therefrom.

While *Nsengiyaremye*[9] focuses on the description of a good deal of tricks that were played between the Rwandan Patriotic Front (*RPF*) and the Habyarimana regime towards the genocide, this dissertation analyses and criticises those tricks through their background and their aftermath in the context and development of the state's system.

This dissertation also tries to go far beyond studies by Campbell[10], Cohen[11], DesForges[12], Human Rights Watch[13] and Prunier[14], and other studies on the Rwandan genocide because, although most of them are accurate on the matter, their confinement to the genocide does not reveal the state of human rights as a whole, as they do not address the issue of democracy and the rule of law in the nation-statehood context. This dissertation shows how the genocide is one (though the most horrible) of many human rights denials and one of the results of the failure of the Rwandan State to fulfil its prime task of promoting the civil, political, social and economic development of its citizens

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[5] Reyntjens, F., Pouvoir et droit au Rwanda, Tervuren: MRAC, 1985; L'Afrique des Grands Lacs en Crise - Rwanda, Burundi: 1988-1994, Paris: Karthala, 1994.

[6] Nkundabagenzi, F., Evolution de la structure politique du Rwanda, thesis, UCL, 1961; Rwanda Politique 1958-1960, Bruxelles: C.R.I.S.P., 1962.

[7] Lemarchand, R., Rwanda and Burundi, New York: Praeger, 1970.

[8] Codere, H., The biography of an African society: Rwanda, 1900-60, Annales series *in 8, MRAC, Tervuren, No. 79, 1973;* Hertefelt (d') and Coupez, La royauté sacrée de l' ancien Rwanda. Texte, traduction et commentaire de son rituel, Tervuren: M.R.C.A., 1964; Lacger (de), Le Rwanda ancien et le Rwanda moderne, Kabgayi, 1959; Newbury, C., The cohesion of oppression. Clientship and ethnicity in Rwanda 1860-1960, New York: Columbia University Press, 1988.

[9] Nsengiyaremye, T., Rwanda: The unknown tragedy, Lusaka: Kanyama, 1997; Sellström, T. and Wohlgemuth, L., "The International Response to Conflict and Genocide from the Rwandan Experience" *in*: Journal of Humanitarian Assistance, March, 1996.

[10] Sellström, T. and Wohlgemuth, L., "The International Response to Conflict, 1996.

[11] Cohen, Andrew J., "On the trail of the genocide", *New York Times* (7 September 1994).

[12] DesForges, A., Leave none to Tell the Story: Genocide in Rwanda, Human Rights Watch Report, February 1999.

[13] Human Rights Watch, Arming Rwanda: The Arms Trade and Human Rights Abuses in Rwandan War, New York, January 1994; "Immediate Communiqué", June 6, 1994; The Aftermath of Genocide in Rwanda, September 1994.

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and their protection on an equal footing.

This dissertation also tries to fill the lacunae found in a number of writings that are descriptive of press freedom[15] and some aspects of women's rights.[16] Indeed, the isolation of these writings does not allow them to explain what went wrong and what is to be done about the system of human rights and the rule of law itself even though Rwanda is party to most international human rights instruments.

All those studies do not provide an illuminating discussion of the ways and means of developing human rights roots in that country. They have ignored the fact that the failure of human rights in Rwanda is a consequence of the failure of the whole system. The author argues that, at independence, Rwandan people had not been prepared for the task of statehood by the time independence became a reality. As a matter of fact, there was a completely inadequate state system. There was not really a Rwandan nation-state. And the conditions have not changed yet. The failure of Rwanda as a democratic constitutional state lies in the fact that many things have gone wrong. These include, but are not limited to, the fact that the state formation itself has gone wrong, civil society has never flourished, and the various institutions and structures for the control of the exercise of power have never been adequate in promoting and fostering human rights. Not surprisingly, we saw the dramatic failure with respect to the genocide and many other human rights denials before, during and after the genocide. In terms of what had been happening since 1990 through 1994 and subsequently, many Rwandans are less prepared now. There is more fear, more distrust, less reconciliation. There is more selfishness among Rwandan leaders, more absolutism and less democracy.

Nevertheless, other analysts and politicians recommend well-meant remedies such as the creation of an exclusive Hutuland and Tutsiland and reconciliation. However, Hutuland and Tutsiland advocates[17] do not suggest ways and means of operation, mostly because they do not sufficiently

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[14] Prunier, G., The Rwanda Crisis. History of a Genocide, New York: Columbia University Press, 1995.

[15] Urumuli rwa Demokarasi, No. 120, 1973; Kinyamateka, April 1885; Sibomana A., Gardons espoir pour le Rwanda, Desclée De Brouwer, 1997; Reporters Sans Frontières, Rapport sur la liberté de Presse au Rwanda, Paris, May 20, 1998.

[16] Ntampaka, C., La décennie des Nations-Unies pour les femmes et la situation des droits de la femme au Rwanda, *Revue Juridique du Rwanda*, 1987/2, p. 111-151; L'évolution des droits de la femme au Rwanda, *Penant*, 1988, p. 43-74; L'apport de la loi du 27 octobre 1988 sur les droits de la femme au Rwanda, *Revue Juridique du Rwanda*, 1990/1-2, p. 32-39; La Femme et la fille dans leur famille d'origine, Kigali: Haguruka, 1993; Kamanzi, S., Le droit rwandais et la Femme, *Dialogue*, No. 193 October 1996, p. 21-25.

[17] Rutsindura, K., "Partition as a Way of Restoring and Maintaining Peace in Rwanda", Working Paper, Nairobi, June 1997; Karegyeya, C., "The Final Solution", *Rwandafor, 1996*. Griggs goes further by proposing partition of the entire region (Burundi, Eastern Congo and Rwanda) into a Hutuland and a Tutsiland. *Griggs, R., The Great Lakes Conflict:*

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consider the context and development of the Rwandan problem, and the protagonists for reconciliation[18] do not explore the underlying philosophy and the outcome of the reconciliation approach in order to prevent the repetition of violence, eradicate the culture of impunity and establish a true state of law. In particular, they fail to explain how to improve the already-failed Arusha Peace Agreement that they rely on to avoid a vicious cycle of human rights abuses. The critical analysis and proposals in this dissertation fill these lacunae. Beyond a few proposals on truth and reconciliation[19], a new way of thinking about ends and means of democratic government as a guideline for the building of a viable state is offered. However, it should be understood that the conceptual framework in terms of which the author focuses on the bill of rights is part of a broader picture of the failure of the State in Rwanda.

This dissertation is divided into chapters and a conclusion. In Chapter one, the author argues that the Rwandan nation-state was built on a consensus that not all Rwandans are fundamentally equal by birth, despite statements to the contrary in the constitution. This chapter accounts for the pre-colonial and colonial roots of the contemporary Rwandan State which remain highly relevant for understanding the Hutu-Tutsi problem as one of the reasons for the failure of the post-independence state itself and thus of human rights in Rwanda. The pre-colonial legacy consists in the institution of Tutsi superiority and Hutu inferiority status supported and aggravated by colonial rule, which also established repressive legislation and abuse of human rights.

In Chapter two, the human rights provisions in the Constitution and the extent to which they have been respected or violated in practice are examined. The states of emergency declared in 1963, 1965, 1973, 1982, and from 1990 on had a tremendous impact on human rights and democracy. The author also considers the impact of the one-party state on the protection of human rights with particular focus on the reasons for the establishment of one-party rule, the concept of party supremacy, the relationship between party organs and government organs, freedom of association

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Strategies for Building long-term Peace, Center for World Indigenous Studies 4 World Atlas, 1997.

[18] See particularly RDR, Plateforme Idéologique du Rassemblement pour le Retour des Refugiés et la Démocratie au Rwanda, Paris, 23 August 1998. See also "Comments in the Discussion of the Paper by the Minister of Justice", in Newick Park Initiative, *Rapport de la Conférence tenue à Kigali du 19 au 21 août 1997;* "What is understood by Justice in Rwanda today? What can be justified in Rwanda today by reference to lack of means, technical and human and what cannot? Paper presented by Gerald Gahima, Secretary-General of the Ministry of Justice", in Newick Park Initiative; RUKEBA, C., UNAR. *Communiqué de Presse*, 15 décembre 1997; Forces De Resistance Pour La Democratie, *Plate-Forme Politique*, Brussels, March 1996, p.72; Rwanda Pour Tous, *Communiqué de Presse*, Brussels, 21 November 1995; GASANA, J., *Lettre au Président de la République Rwandaise*, Brussels, 21 March 1996; The Detmold Confession, *Dialogue*, n° 195, January 1997.

[19] See for example Vandeginste, S., Truth and Reconciliation Approach to the Genocide and Crimes Against Humanity in Rwanda, Working Paper, Antwerp, 1998.

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and assembly, the pre-eminence of the Party and Republican President, elections to public office, and freedom of speech within Party organs. The basic argument in this chapter is that human rights have failed because of the scant regard shown by post-colonial leaders who have not been fully committed to the bill of rights and the fact that the one-party ethnically-based State they established is not compatible with the effective protection of human rights. Moreover, the undermining of the creation of civil society by Rwandan rulers has resulted in the denial of the opportunity for Rwandans to actually participate in the democratic process through expressing their choices. Furthermore, the judiciary and the legal profession have failed to protect human rights even within the limited realm left by the states of emergency. In particular, it is argued that the lack of independence of the judiciary, training for judges and lawyers, human rights education and legal assistance for the public were important with regard to the failure of the judges and the bar.

Lastly, Chapter three considers alternative ways of protecting human rights and how the existing machinery can be reinforced, after examining, in some depth, whether the recent experience of genocide, intervention of international organisations and the attention of non-governmental organisations, and the behaviour and presence of the international criminal tribunal for Rwanda, may be able to shift the legacy onto a more helpful path. The author argues that these factors do not seem likely to shift the legacy. The post-genocide state is a one-party Tutsi-lead state, excluding about 90% of the population from the management of public affairs. The transition to a human rights-based constitutional democracy has proved not to be on the political agenda and the desire for lasting peace is likely to go unheeded. In this regard, the international system itself has failed to maintain peace and security, yet the most important task of the United Nations Organisation, and also the far more direct and the far more obvious way, is to protect basic human rights and freedoms. The Organisation of African Unity has been ineffective and the African Charter of Human and Peoples' Rights, which has succeeded nowhere, cannot, as it stands, play a successful role in Rwanda. We are actually facing the demise of international law as regards human rights and the rule of law in Rwanda. What is urgently needed, is truly national reconciliation and the construction of a peaceful society and a viable state with a negotiated bill of rights, directive principles of state policy, improved access to the legal system, the ombudsman institution, a human rights commission, education and other devices and measures for the promotion and protection of human rights.

This dissertation covers the period from pre-colonial Rwanda up to July 1999, that is, from the birth of the Rwandan nation-state through colonisation and the post-independence era up to 5 years after the 1994 genocide. The period provides a clear view on human rights roots in Rwanda and an

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assessment of the prospects for the future, as post-genocide rulers have promised to establish "the bases for democracy and human rights" within 5 years after the seizure of power.

Chapter One

The Formation of the Rwandan State

1.1 Introduction

> What is needed ... is ... studies of aspects of public law set in their historical, political and economic context so that, first, the role the law has played, is playing and may in the future play in the development of the polity may begin to be perceived, and secondly, the way the polity has developed, is developing and may in the future develop, may to some extent be seen through the perspective of the law.[20]

The aim of this chapter is to analyse the history of nation-state formation in pre-colonial and colonial Rwanda, not for reasons of historical curiosity, but because, as *Cardozo* once asserted, "history in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future".[21] Moreover, it has been said that any "worthwhile study of the problem of government and politics of Africa must necessarily take account of its past forms of political, social and cultural organisations."[22] The aspect the author wishes to analyse is the build-up of indigenous social and political structures towards the end of the pre-colonial period. In examining the role of custom in pre-colonial Rwandan politics we will see how the Tutsi caste manipulated values, norms, beliefs, symbols and ceremonies to develop a political organisation and means to gain dominant power as a minority regime over the overwhelming (Hutu) majority of the Rwandan population. These processes show how Rwandan society evolved through particular perceptions and claims that predicted ongoing conflict, denial of human rights and absence of constitutionalism and the rule of law in the future.

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[20] Ghai, Y. P. And Mc Auslan, J. P. W. P., Public law and political change in Kenya, Nairobi: Oxford University Press, 1970, p. vi.

[21] Cardozo, B.N., The Nature of the Judicial Process, 1921, p. 53.

[22] Elias, Government and Politics in African Context, 2 ed., 1963, p. 1.

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1.2 Pre-colonial era: Development of ethnic polarisation

1.2.1 The settlement of Rwanda

The population of Rwanda comprises three ethnic groups: Hutu, Tutsi and Twa. The Twa are related to the Pygmies of the Congo forest and probably settled in the area a very long time ago. The Hutu are related to the *Bantu* of the other inter-lake kingdoms, but there is no indication whatever concerning their place of origin, which some say is in East Africa and others say is in Central Africa. The only fact recorded by historians is that they settled in the area before the arrival of the Tutsi, who are reported to have come from the north and who adopted the language and culture of the already settled populations.[23]

Around the beginning of the twentieth century, and perhaps a little before, the wave of *Bantu* migration, from sub-Saharan savannahs, had spread into the green and fertile Great Lakes Region.[24] According to *Kayitare,* some immigrants had continued along their route towards the south while others had stayed on. Amongst the latter were some Hutu ancestors who had established themselves in the "region of thousand hills" that they, later, made into Rwanda. In the mountain and savannah forests, which then covered the Rwandan territory, they found the Twa hunter populations already established. To appropriate lands to be cleared for cultivation in the Twa hunting territory, *Bantu* immigrants either came to a friendly agreement with them and paid some tribute, or simply established themselves by force.[25]

Maquet has observed that these *Bantu* immigrants were grouped in solidly organised communities with, at least in some cases, a supra-clanship command based on the monarchic model called *rayauté sacrée* (holy kingship).[26] According to d'Hertefelt, *Bantu* monarchies built on an almost identical model existed not only in the inter-lake region, but also up to a thousand kilometres further south, particularly in present day Zimbabwe.[27] This suggests that they maintained their traditional

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[23]For a detailed study on the settlement of Rwanda, see Vansina, J., L'Evolution du Royaume Rwanda des Origines à 1900 (XXVI),

[24]This inter-lake region is situated between Great Lakes Albert, Edward, Kivu, Tanganyika, Victoria and Kyoga.

[25]Kayitare, L'Organisation politique dans le Rwanda Traditionnelle, working paper, Kigali, June 1997, p. 8.

[26]*Maquet*, M., Le Système des relations sociales dans le Rwanda ancien, Tervuren: M.R.C.B., 1954, p. 10. *Maquet*'s assertion finds its justification in *d'Hertefelt*'s observation that the traditional *Bantu* monarchies of "holy kingship" type had inherited their political traditions from a sub-Saharan *Bantu* founder which in turn, had inherited them before from *Kouch* and Pharaonic Egypt old kingdom. Hertefelt (d'), M., Cours d' Histoire de l' Afrique, des origines à la fin du XVIIè siècle, Butare, n.d., p. 19.

[27]Hertefelt (d'), Cours d' Histoire de l' Afrique, des origines à la fin du XVIIè siècle, at 19.

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political organisation during their migration and re-established it after their journey.

This monarchic hypothesis helps to explain the rapidity of the migration to the south along the Great Lakes chain of certain *Bantu* communities. *d'Hertefelt* goes on to affirm that the combination of the strength of their numbers, the robustness of their race, their iron arms, a specific technical organisation, trained warrior forces and centralised authority, ensured them migratory success.[28] During that period, Rwanda's agricultural and pastoral civilisation prospered and resulted in substantial demographic expansion. Its use of iron technology also contributed to its prosperity.[29]

Before the arrival of Tutsis, there were about 50 Hutu monarchies of which names still indicate their particular regions: *Nduga, Bugesera, Mutara, Buyaga, Busigi, Ruhengeri, Bushiru, Busozo, Bukunzi, Bukonya, Buhoma, Rugamba-Kiganda, Kingogo, Budaha, Bwishaza, Marangara, Busizi, Bulembo-Ivunja, Buliza, Ntonde-Karama, Kagogwe, Muhinga-Nyabitare*. According to certain traditions, the three monarchies of Rwanda have been those of *Basinga*, with *Barenge* as dynastic lineage; that of *Bagesera* and that of *Bazigaba*.[30] History has left reminiscences of the last petty Hutu kings, heads of small principalities based on the clan, representatives of the ancestors, and magicians having power over the earth's fertility[31], who "had the power to make rain fall, to chase away the crop-destroying insects, to pass on a germinating power to seeds, to ward off insects and cattle parasites, and to cause numerous and healthy calves to be born thanks to their occult science".[32] *Davidson* observes that, afterwards, these principalities were conquered and annihilated by the Tutsi invaders.[33] However, little is known about the Hutu civilisation as such, mostly because its memory has been erased by the Tutsi arrival and Rwandan history does not say much about the earlier period.

The Tutsi were said to be related to the *Hima* who made up the ruling caste in all the inter-lake kingdoms, from *Bunyoro* in southern Uganda to *Buha* in western Tanzania. Historians suppose they came from countries situated to the east of Lake Victoria and their earliest origin has been traced to Ethiopia. The immigration of the first Ethiopids took place before the fifteenth century.[34] Little by little, these early *Hima*, nomadic herders, settled in the country, enslaved the natives and founded several

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[28]Ibid.

[29]Ibid.

[30]Id., at 24; Delmas, Généalogie de la noblesse du Rwanda, Kabgayi, 1950, p. 153.

[31]They were called "*Abahinza*", meaning "those who make grow"

[32]d'Hertefelt, M., Cours d' Histoire de l' Afrique, at 24.

[33]Davidson, I., L' Afrique avant les blancs - Découverte du passé oublié de l'Afrique, Paris: PUF, 1962, p. 212.

[34]Kayitare, L'Organisation politique dans le Rwanda Traditionnelle, at 10.

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small states without much internal cohesion.[35] As a justification for the Hutu ousting, *Davidson* puts it that those who are the most experienced in nomadic life always win when two parties are equal in number and in power. He claims that, though technically more primitive, the nomads were militarily stronger because of their way of life as well as their organisation, this being the reason why they subjugated and used, to their profit, the sedentary capacity for work and production of cultivators, potters and blacksmiths. He concludes that the *Bantu* were defeated, "and their civilisation's development was [held] up to ridicule and came to its end".[36] In the Great Lakes Region, and particularly in Rwanda and in Burundi, the "invaders" who penetrated first to parts of current Uganda were called Tutsi. Some of them established themselves there, whereas others progressed to the south, some infiltrating Rwanda, others the intermediate region between Rwanda and Lake Victoria.[37]

After the arrival of the *Hima*, the *Bunyoro* kingdom disintegrated under the shock of a Nilotic invasion from the north and the invaders became masters of the kingdom. Probably in the fourteenth century, several Ethiopic kingdoms and principalities occupied eastern Rwanda. The oldest ones were *Karagwe, Bugufi* and *Mubari*. Afterwards, *Ndorwa, Bugesera* and *Gisaka* were established. At the time of *Gihanga*, the first mythical king of Rwanda, these states were occupying the entire eastern portion of present-day Rwanda.[38] Although this is based more on myth than on history, one can deduce that Rwanda, for a long time, was a small chieftaincy on the shores of Lake *Muhazi*. A Tutsi clan, *Basindi* or *Banyiginya*, travelled past the *Ndorwa* and continued to the south, first penetrating

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[35]d'Hertefelt, Cours d' Histoire de l' Afrique, at 31.

[36]Id., at 213.

[37]Kayitare, L'Organisation politique dans le Rwanda Traditionnelle, at 10."*Batutsi*", in the plural form, would mean "those who arrive" (from "*gutuka*": to arrive, to get to). In kiganda (one of the Ugandan languages), "*ututse wa*?" means "where do you come from?". In complete agreement with *Davidson*, *Habimana* asserts that the hamitic clans' invasion in the region and in the whole East Africa came to, little by little, dislocate the groups, interrupt the trends of ancient relations, and soon compel the iron *Bantu* civilisation to isolation first, and then to fade away. In order to date the first hamitic penetrations in Rwanda, he refers, on one hand, to the chronological list of clans' chiefs, then that of the Tutsi kings, as reported by the Tutsi oral tradition; and, on the other hand, to approximate chronologies finalised in neighbouring countries of Uganda and Burundi. *See Habimana, C., The Bantu population, Dare-es-Salaam: Kasege, p. 80.* Certain chroniclers of Rwanda, influenced by the neighbourhood of the last Tutsi kings, had dated the first hamitic penetrations in the twelfth century, and even around the year 1,000, suggesting, as historical, about twenty legendary and mythological kings, and calculating their length of service on the basis of an average reigning period of 30 years. Nevertheless, soon after, the legendary kings were effaced from the list, and the reigns' duration was reduced to an average of 20 years. This way of dating leads to dating the establishment of the first Tutsi clan in *Buganza*, in east-central Rwanda, around the second half of the fourteenth century. *Paternostre de la Mairieu, B., Le Rwanda, Son Effort de Développement, Antécédents Historiques et Conquêtes de la Révolution Rwandaise, Kigali: Editions Rwandaises, 1972, p. 26.*

[38]*Gihanga* crossed *Mubari* and settled in *Gasabo* at the south-western tip of Lake *Muhazi*, between *Gisaka* and *Bugesera*. *Bugesera* and native principalities extended westward from the lake; the main one was the *Renge* kingdom, which supposedly bequeathed the customs regarding the organisation of the State and the divine royalty to *Gihanga*. The dynastic genealogy names eleven mythical successors who supposedly succeeded *Gihanga* in *Gasabo*. *Histoire et Chronologie du Rwanda, Kabwayi, 1955.*

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Mutara. They met the Hutu monarchy of *Bazigaba* and, according to the tradition, became united through inter-marriage. It is probable that the *Banyiginya* adopted certain monarchic customs from the Hutu of *Mutara* before they pursued their progression and were finally established in the south of *Buganza,* where they were placed side by side with the Hamitic clan of *Bahondogo,* established, in the meantime, in *Bugesera*. The *Banyiginya* chose *Gasabo*, south of Lake *Muhazi*, as the centre of their establishment in *Buganza*. However, their pastures, soon after, were taken over by the Hamitic clan of *Ndorwa* in the north and, in the southeast, by the Hamiticised monarchy of *Bagesera-Bahinda* (*Bazirankende*) of *Gisaka*. In order to avoid being absorbed, they had to move to the west.[39] Towards the end of the sixteenth century, they extended a hold, to one side, over the rest of *Buganza*, and, to the other side, over the *Bwanacyambwe, Buliza, Bumbogo, Buyaga* and *Busigi*. According to *de Lacger*, it is from the Hutu king of *Busigi* that they conquered the *Kalinga* (or sacred royal drum) which they later made the symbol of their political power. The particularity of the Tutsi Kalinga was its decoration with the testicles of vanquished Hutu princes.[40]

The pressure exerted by the diverse Tutsi clans on the whole of Eastern Rwanda provoked the displacement of numerous Hutu populations to the mountainous and forest regions situated in the west. Thus, when the Tutsi clan of *Bahondogo* was established in *Bugesera*, numerous Hutu refugees of that region emigrated to *Busozo* and *Bushiru* in the west, whence they scattered all over the country.[41] *Habimana* explains this displacement by the fact that these Hutus, who were not used to domination, were running away from Tutsis for fear of being subjugated under a somewhat feudal system developing in the region.[42] But they did not escape. Tutsis conquered almost all the Hutu kingdoms. Remaining Hutu principalities were no obstacle whatever to Rwanda and were absorbed into the kingdom one after the other. As a result of these conquests and, unlike in other African countries, Hutus and Tutsis were spread almost evenly throughout Rwanda and have been living mingled on the hills. Neither has created their own particular land.[43]

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[39]See Pagès, Un royaume hamite au centre de l'Afrique, Bruxelles: IRCB, 1933, p. 82; d'Hertefelt, Les clans du Rwanda ancien, Butare: INRS, 1971, p. 43; Delmas, Généalogie de la noblesse du Rwanda, at 105; de Lacger, Le Rwanda ancien et le Rwanda moderne, Kabgayi, 1959, p. 104.

[40]de Lacger, Id.

[41]Delmas, Généalogie de la noblesse du Rwanda, at 144

[42]Habimana, *The Bantu population*, at 97.

[43] The only notable exception was the northern region (Ndorwa, Mutara, Mulera), where the Tutsi never accounted for more than a tiny fraction of the total population.

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1.2.2 The germ of oligarchy

When state leaders and strongmen confront one another in the contest for ascendancy, "each reverts to a typical repertoire of stratagems and tactics, one of which is to modify the regime format of the State" along a variety of dimensions.[44] Against the background of about fifty local monarchies mentioned in the oral tradition, one may wonder whether Rwanda did not experience any period of strong centralisation during the somewhat "1500 years" of *Bantu* predominance, a centralisation which would have been favoured by the mountainous relief of the country and historical vicissitudes as a measure against the political balkanisation, which ended up in the formation of that mosaic of local monarchies and clans. Unfortunately, no research has been conducted into this and the only observation made by *Karemano* is that, around the sixteenth century, the Hutu monarch of "*Grand-Nduga*", called *Mwami* or *Muhinza*, had under his dependence not only the *Nduga*, but also *Marangara, Ndiza, Kabagali, Rukoma, Bwanamukari, Nyaruguru,* and *Mayaga*, in short, the whole of Central Rwanda. On the other side, he argues that the culture, religious beliefs, political customs and the language of the Rwandan population in the sixteenth century presented such social unity, such a "weight" of community, that Tutsis adopted it entirely.[45]

Regarding the concept of "holy kingships", the institution of kingship was the pivot of the political structure and a focal point of political, religious, legal, economic and symbolic authority and practice. The power of the Hutu monarch was an absolute power, though limited "by the custom and tempered by the opinion".[46] As in many other *Bantu* kingdoms, the king did not function in an environment without constraints, the most important of which were located in the administrative system. An informal council of confidential and trusted advisors provided the first check on arbitrary rule. A second check was ensured because the ruler consulted a wider, more representative, formal body of advisors, *the ward heads*, and finally, the public assembly of all adult men. In these assemblies everybody spoke, even to the effect of overruling decisions reached in earlier consultations. However, this was not a common occurrence and the meetings generally served as a public forum where complainants aired their grievances, authorities sought and conferred public consent, and

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[44]du Toit, P., State-building and democracy in Southern Africa, Pretoria: HSRC, 1995, p. 28.

[45]Karemano, Rwanda Traditionnel, Kigali: Printerset, 1988, p. 22.

[46] In order to evaluate the nature of the king's power, both *Davidson* and *Du Toit* refer to the situation in Zimbabwe. Both agree that the monarchs of Zimbabwe were not free to legislate out of the law and tribal custom and had probably to be killed or deposed if they failed in an equitable government. *Id., at 261; du Toit, State-building and democracy in Southern Africa, at 29. Davidson* goes on even to argue that the populations of Zimbabwe "chose their king to govern them with equity". *Davidson, L' Afrique avant les blancs, at 181.* However, whether the rule at that epoch may be called democratic in the contemporary sense remains unclear.

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people reached consensus on matters of public policy.[47]

According to the "sacred" or providential concept of royal power in the Great Lakes region, the health and the behaviour of the *Mwami* (king) had their repercussion in the joy and prosperity of his people. His role was that of an intercessor with divine providence. He possessed for his subjects the beneficial virtue of crop fertiliser, ritually inaugurated the first fruits, provided rain, and protected crops from natural scourges such as drought, disease, grasshoppers, parasites, etc.[48]

This socio-political system, characterised by hierarchy as well as by limited, male, public participation and consultation and by limited consent within the given hierarchical social and political system, consolidated Hutu positions up to the era of contact with the Tutsi settlers who took over from them. Observers affirm, however, that when the Tutsi adopted the organisation of the Hutus' "sacred kingship", they added a new characteristic that corresponded with their own traditions and their warlike practice of power: kingship became autocratic and ruthless. Everything fell under its dependence as a property at its discretion. Moreover, the Tutsi kings had, on one side, the consultative committee grouping of War Chiefs and, on the other side, the hereditary *Abiru* committee in charge of royal rites.[49] The administration of diverse regions occupied by the Tutsis was entrusted by the king to the *Batware b'intebe* or Great Chiefs, representative of the old warlike power of the chief of the nomadic clan. Sometimes, especially in times of crisis, the king summoned them and they were consulted on the situation.[50] However, it seems that the patterns of behaviour in the face-to-face relationships with an authority, particularly the supreme one, were such that an opinion opposed to that of the *Mwami* was very unlikely to be voiced.[51] Consequently, the main use of that council appears to have been for the king to explain what he wanted to do and to elicit suggestions on the means of carrying it out. Moreover, each of these chiefs, at least those of the frontier zones, was responsible for a permanent armed group, composed of 150 to 200 male youths.[52] In case of important warlike enterprises the troops were increased to include not only all the Tutsis capable of combat service, but also an increasing number of Hutus. One can say that, at a certain moment, all the Hutus in the hamiticised regions, with their cattle, were attached to an army, either as combat

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[47] Id.

[48] Vansina, L'Evolution du Royaume Rwanda, at 77.

[49] Abiru means "custodians of the knowledge of royal rites called *ubwiru.* Ibid.

[50] See *Maquet* and d'Hertefelt, Elections en Société Féodale, Une Etude sur l' Introduction du Vote Populaire au Rwanda-Urundi, 1959, p. 4.

[51] *Maquet*, Le Système des relations sociales dans le Rwanda ancien, at 157.

[52] Ibid; De Lacger, Le Rwanda ancien et le Rwanda moderne, at 109; Paternostre de la Mairieu, at 54.

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auxiliaries or as porters.[53]

Those Great Chiefs with general unlimited competence had two parallel managers under their command. First, the *Banyabutaka* (Chiefs of Agricultural Lands), sometimes Hutus, but, in the final years, almost always Tutsis because, as already seen, Tutsis were successors to Hutu power and were progressively substituted for Hutus; then, the *Banyamukenke* or Chiefs of Pastures, always Tutsis. They acted as representatives of the ancient civil power of the chief of the Tutsi clan, with its specific implications of War Supply Corps. These two managers concurrently exercised, in the same region, similar administrative powers of justice and policing, one on agriculturists and their lands and the other on shepherds and their pastures.[54] Below these spread a vast network of subchiefs from whom tribute was exacted for the higher chiefs and the kings. How much power the chiefs and sub-chiefs claimed for themselves, and for how long, was entirely dependent on the *Mwami*'s grace. They were "bureaucrats", as *Lucy Mair* noted, "in the sense that they did not claim their position by right of inheritance or by virtue of any prior connection with the area to which they were appointed",[55] but by the *Mwami* 's will.

The *Abiru* were the highest ranking dignitaries of the kingdom, had different tasks and were strictly ranked in a fixed hierarchy. Their activities, in general, however, were concerned with the preservation of ritual knowledge and the accomplishment of ceremonies essential to the existence of Rwanda and its government. This knowledge and activities were kept secret from everybody who was not a *mwiru*.[56] They were under the king's authority in the sense that he could create new offices of *mwiru* and he could dismiss anyone who was disloyal. The royal control was limited to this. It was

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[53]Paternostre de la Mairieu, Id., at 54.

[54]Ibid. See also Kagame, A., Le code des institutions politiques du Rwanda précolonial, Brussels: IRCB, 1952, p. 119. The king levied on each *inzu* (family community), through his decentralised agents, taxes in kind on one hand (cattle, agricultural and craft produce), drained to his residence in each chieftaincy, and labour taxes, on the other hand. To the total of taxes due to the king, each decentralised authority added, for his own salary, one fourth, to which he also added taxes and privileges not included in the quota: *abatora* (regular taxes of banana bunches already marked in each banana plantation); *indabukirano* (gift due to the authority during his nomination); *gutora* (the taking of certain areas from agricultural or pastures lands belonging to the citizens); and the right of pasture in the citizens' falloffs. In case the authority's cows were interested in a pasture, it was an offence for a farmer, however poor he might be, to chase them back. As for the work taxes due by each family, they came to two days out of five, which is 146 days per year. In total, each male had to devote around one third of his work to maintain "the beneficiaries of the tax system that were the king, his wives, his favourites, and the administrative chiefs". *d'Hertefelt,* Cours d' Histoire de l' Afrique, *at 16.* Apart from those fiscal resources, the king collected pastoral taxes from his "Great chiefs" who were, at the same time, his important clients, as will be indicated later. They had to send milk and beer to him alternatively and without interruption and to fill his garret of provisions; cows brought from war raids; and, each year, a fully-grown bull, a sterile cow, bull-calves and rams for the sacrifice, the divination or the butchery. Nayigiziki, S., and *Maquet*, S.S., Les droits fonciers dans le Rwanda ancien, Bruxelles: BAC, 1957, p. 49.

[55] Mair, L., Primitive Government, Harmondsworth and Baltimore: Penguin Books, 1962, p. 153.

[56]Singular of biru

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really the minimum, without which *Abiru* would have been completely independent of the king. The offices were hereditary and even when a *mwiru* had been dismissed one of his sons succeeded him.[57] Their domains were exempt from any interference by the land chief or the cattle chief.

The *Abiru* had to memorise secret rules governing, for instance, the order according to which queens were to be chosen from different descent groups, the ritual to observe in the case of the spreading of cattle disease, lack of rain, warlike ceremonies, celebrations of the sorghum harvests, etc.[58] The *Abiru* institution safeguarded the interests of the great groups of Tutsi descent. This function is seen clearly in the determination made for several reigns in advance of the secondary lineages and clans from which the queens could be chosen successively. The *Abiru*, as representatives of their kinship groups had, as it were, established the order in which the interests of different clans and lineages would be favoured in turn.[59] The most striking fact was that not one *mwiru* knew the entire body of customs. That knowledge was divided into parts, the remembering of each being entrusted to a *mwiru*, that is to say a descent group, as the office was hereditary.[60] In this way it may be said that the exclusive knowledge of a part of the most important Rwandan ritual had virtually become the property of one of several great Tutsi descent groups.

A second function of the *Abiru* institution was to secure the continuity and the prevalence of the tradition that could have been endangered by the very considerable powers of the king.[61] That traditional body was not unlike a constitution in a modern state and the *Abiru* institution could be said to have had a role similar to that of a supreme court judging whether a new rule is compatible with the fundamental charter of the country. Of course, they explicitly had neither such a task nor such institutionalised means to prevent the king from establishing new rules, but the disapproval of an innovation by the *Abiru* was not to be taken lightly as they represented the great *Tutsi* kinship groups.[62] Even though they may not have had any control over a particular course of events, they alone had the authority to sanction political change. In this respect, perhaps no other institution did more to keep alive the "myth" of the monarchy, or, for that matter, to thwart any innovation likely to endanger its primeval purity.

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[57] *Maquet*, Le Système des relations sociales dans le Rwanda ancien, at 127.

[58] Ibid.

[59] Ibid.

[60] Ibid.

[61] Ibid.

[62] Mbonimana, G., Critique Historique, Lecture, Butare: UNR, 1984, at 40.

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According to ancient customs, justice was applied by that hierarchy of political authorities. The king reserved the right to settle very important lawsuits. The "Great Chiefs" reserved this right with regard to matters relating to cattle, since the latter was now shared out, in the clientship system, among both agricultural and pastoral populations. Generally, for the most serious offences (murders, mutilations, etc.) there were both civil and penal judgements and punishing was under the competence of the police power of chiefs-judges. For less serious offences (assault and battery, certain thefts, etc.), only the civil aspect was judged (i.e. compensation). In addition to compensation, the guilty party had to pay an indemnity to the judging authorities who grew rich from their judicial activity. This practice resulted in serious abuses: the payment of an indemnity to the chief could allow the guilty party to neglect the compensation due to the victim. Furthermore, the *res judicata* principle was not known, since the authority could change his decision according to the mood of the day. Generally, jurisdiction under Tutsi power, at the beginning of the twentieth century, presented serious defects: arbitrariness, partiality and venality of judges, and non-execution of judgements. As a consequence, relatively few people lodged appeals for the resolution of disputes.[63]

The most striking fact was that the non-separation of political and judicial power was a real curse as political authority was based in and sought to maintain itself as a minority rule perceived by Hutus as foreign rule over the local majority of Hutus. The chief judge became a political judge and was therefore in a good position to impose his full domination. *Karemano* concludes that Tutsi power always remained a power of conquest. Authorities and notable people behaved as "in conquered country", and the Hutu populations of progressively subjugated regions were deprived of every access to the traditional political power that they had lost little by little.[64] All power was exercised exclusively by some Tutsi clans, especially the *Bega* and the *Banyiginya*. But how extensive and effective were the controls exercised by the upper caste? What were its relationships to the subordinate groups?[65] The most convenient approach to the patterns of dominance is the one suggested by the Italian Marxist, *Antonio Gramsci*, in his use of the term "*egemonia*", hegemony. For *Gramsci*, hegemony was characteristic of an order "in which a certain way of life and thought is dominant, in which one concept of reality is diffused throughout society in all its institutional and private manifestations, informing with its spirit all taste, morality, customs, religious and political

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[63]Ibid.

[64]Karemano, Rwanda Traditionnel, at 70.

[65] Plausible answers to these questions are suggested by M.G. Smith's definition of pluralism: see Smith, MG., *The Plural Society in the British West Indies*, Berkeley: University of California Press, 1965. But see also Bryce-Laporte, R.S., "M.G. Smith's version of pluralism: The questions it raises", *Comparative Studies in Society and History,* Vol. X, No. 1, October 1967, p. 116. For an outstanding contribution to the theory of social pluralism, see Leo Kuper and M.G. Smith, *Pluralism in Africa*, Berkeley: University of California Press, 1969.

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principles, and all social relations, particularly in their intellectual and moral connotations".[66] In this sense, the Tutsis formed a "hegemonic" caste, whose values were "diffused throughout society in all its institutional and private manifestations". In addition, it will be seen, in section two, that their power would be so magnified by colonial authorities as to acquire almost unlimited scope over subordinate groups. This situation suggests a form of institutional control that made it virtually impossible for the monarchy to dissociate itself from the principle of Tutsi hegemony. Monarchic rule and caste hegemony were so intimately intertwined that any attempt to bring about a status reversal through democratic means would be bound to be interpreted by the Tutsi as a threat to the institution of kingship. It will be seen that, conversely, the abolition of monarchic rule came to be viewed by the Hutu elite as a *sine qua non* of equality, as their marginalization developed profoundly rooted frustration and complexities which would surface during the crisis of the Tutsi regime.

Meanwhile, it is one thing to note that political control ultimately rested in the hands of an oligarchy, but another to mention that their regime did not benefit all the Tutsis[67] because, apart from the favoured Tutsis, a mass of impoverished Tutsis was formed, and their fate became similar to that of Hutu population. In view of the limited and unequal distribution of political power among the Tutsis, the numbers of Tutsis eligible for power and office through their clan membership seem to have been very large. Clan membership was the basis, not only of the social situation in which claims for high status were made by those whose wealth and power were not enough to establish themselves, but also of a viciously competitive political situation in which many Tutsis could see themselves in high positions and offices, on condition, of course, that the present incumbents, as was quite possible, were somehow removed. In the most detailed study of Rwandan clans to date, *d'Hertefelt*[68] provided the 1960 percentage distribution of the Tutsi in the eighteen Rwandan clans. While it is impossible to know whether the distribution was the same at the turn of the century and at the beginning of European influence, it would be very difficult to find reasons to argue for any substantial changes. The two clans known historically to have furnished the men who held many of the highest offices and the greatest number of high positions were the *Abanyiginya* and the *Abega*.[69] In 1960, these two clans comprised almost 40% of the Tutsi population and they were by no means the only clans in which membership conferred unusual eligibility for high office, although the only clan that furnished

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[66] Lemarchand, Rwanda and Burundi, at 32.

[67] We will see in Chapter two that this was all the same for Hutus whose power benefited some groups of Nduga and Kiga people respectively, leaving the mass of other Hutus uncared for.

[68] d'Hertefelt, Les clans du Rwanda ancien, at 53.

[69] Codere, H., The Biography of an African Society, Rwanda 1900-1960, Based on Forty-eight Rwandan Autobiographies, Tervuren: MRAC, 1973, p. 377.

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the *Mwami* was that of the *Abanyiginya*. The addition of other clans considered to be of the highest nobility (the *Abashambo*, *Abatsobe*, *Abasindi*, *Abakono*, and *Abaha*) would bring the total percentage to over 60% of the Tutsis. Add to this already extraordinary picture the fact that eligibility on the basis of clan membership, or preferential eligibility, in some cases, on the basis of some special patrilineage within the clan, were not fixed requirements for any high offices other than those of the *Mwami*, the Queen Mother, and certain court offices, but that many offices could be gained through favouritism, and the degree of competitiveness built into the Tutsi power system seems overwhelming.[70] As a result, a good number of the "*petits* Tutsi" would later unite with their Hutu fellows to organise the great 1959 revolution.[71]

1.2.3 State management in a subsistence economy

1.2.3.1 Subsistence economy

The population of Rwanda is 96% peasant, practising subsistence economy in which each family exploits its patch of land without respite. In the essentially agricultural tradition of Rwanda, land organisation and cattle ownership constituted a basic element of political and social life. In the beginning, Rwandans did not conceive of ownership as a private and exclusive right to the various uses to which a thing may be submitted. They regarded each of the uses as "the object of a particular right". It was not thought necessary that one person should be endowed with the sum of the rights affecting one object.[72] On the contrary, it was usual that "different persons could claim different uses of the same thing". For instance, one person could have the right to sow a plot and to collect the harvest and another to use it for grazing purposes at another time of the year.[73] Neither of them was considered as the owner allowing somebody else to use his property as a pasture or as ground for cultivation.

It follows that arable land and pastures did not belong to individuals, but to family groups. According to *Paternostre de la Mairieu*, in the non-forest regions, due to the easy scattering of families on different hills, they belonged to the relatively limited "*inzu*" group[74], whereas, in the forest regions, the

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[70] Id.

[71] See Murego, D., La Révolution Rwandaise 1959-1962 - Essai d'interpretation, Louvain: Publications de l'Institut des Sciences Politiques et Sociales, 1974.

[72] Sadin, J. B. Folie de Grandeur, Paris: Djil et Cie., 1976, p. 39; Ruhashyankiko, N., Le Droit Foncier Rwandais, Butare: UNR, 1977.

[73] Ruhashyankiko, p. 44.

[74] The collective domain was then called *"ingobyi y' igisekuru"*(the ancestors' cradle).

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lands generally belonged to the *umuryango* (extended group of the sub-clan).[75] However, as a result of the growth in the numbers of members of the clans that were clearing the forest, the forest domain crumbled and the power of the clan chiefs was weakened, thus opening the way to the Tutsi policy of conquest. Hutus made contractual agreements with Tutsis to lease the latter's cattle and, thus, broke away from their former patrons. The new masters did not hesitate to lay claim to their clients' land in default of heirs, emigration or banishment and to turn this land into a purely personal domain that they used as they wished with regard to new clients.[76] This, slowly but surely, began the peaceful revolution which resulted in a new custom according to which the king became the owner of the land and then, as a consequence, of all those people earning their livelihood from it. On each pasture, cultivated plot or forest area, the king had a right similar to the *dominion eminens* of Roman law, the kind of public ownership that a state has over the land within its borders. But he also had the right, if he chose, to prevent somebody from using a particular tract of land in any way at all, which amounts to saying that the king had a right potentially superior to that of anybody else over land. The king's rights could be opposed to "private rights".[77]

Another new custom that developed was the *igikingi* type of land holding, that is "granted" land, given by the king or by Tutsi lineage to *abagaragu* (clients). Theoretically *igikingi* land was for grazing, but in practice the "legal" determinant (i.e. the fact that it was given and could be held either in freehold or as undivided "clan" property in the way of *ubukonde*) became the determining factor when considering this type of land, which in fact was often used agriculturally.[78] The generalisation of *igikingi* increased the capacity for pressure from the political authorities on the inferior Hutu people and *pétits* Tutsis. It also contributed to a strengthening of ethnic feelings, both at the top and at the bottom of society. Neglecting the poorest strata (mostly Hutus and Twas, with a sprinkling of Tutsis) judging, perhaps, that the middle class (made up of Tutsis and a few Hutus) was reasonably happy with the situation as it was, the *Mwami* and his chiefs thought that several elements could be integrated in the ruling group, that is the Tutsi élite, depending on their capacities, their wealth and their potential for exploiting useful blood connections. To open up access to the new *igikingi* holdings, many people had to be *"Tutsified"*, something which many authors called "accession to the nobility"[79], an expression which blurs the distinction between the few high-ranking Tutsi lineages and

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[75]Paternostre de la Mairieu, at 39.

[76]Ibid.

[77]Ibid.

[78] Newbury, C., The Cohesion of Oppression, at 82.

[79] Nkurikiyimfura, J.N., Le Gros Bétail et la Société Rwandaise. Evolution Historique des XIIème-XIVème Siècles a 1958, Paris: L'Harmattan, 1994, p. 96; *Maquet*, Le Système des relations sociales dans le Rwanda ancien, at 171.

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the ordinary Tutsis. But this "ennoblement" prevented the birth of a distinct Hutu chieftainly stratum which could have become a privileged intermediary between the court and the larger population. As a result, Hutus could not be included in the royal chieftainly élite. The extension and hardening of the new centralised system caused them to slide from a status of inferiority balanced by complementarity into that of a quasi-rural proletariat. By the end of the nineteenth century the vast majority, if not the totality of the Hutu peasants, were in a position where they had to sell their labour, first as a social obligation, and then as a monetarised commodity in the colonial system.[80] In that way, there was continuity between the late nineteenth century evolution of the Rwandan State and society and the further transformations during the colonial period. This is one of the elements of an answer to Vidal's interrogation: "How can we explain that, within only two generations, a simple form of social antagonism has turned into violent racial hatred, widely shared way beyond its initial nucleus of fanatics?"[81] This evolution will be clarified by the effect of colonisation as studied in the next section.

Regarding cattle, property in the Western sense was split into three aspects. There was a global right over all Rwanda cattle, even sheep and goats, by which the king could claim actual possession of any of them. The Tutsi king used this right more frequently over cattle than over land. An important chief indulging in intrigues regarded as dangerous by the king might find himself dispossessed of all his cattle. A second kind of right was the ownership without usufruct. The person who had it was not in possession of the cow but could at any time claim possession of the animal and the heifers produced by that beast since the time when the possession had been transferred. This was the right of the lord. In contrast, there was the usufruct right with respect to cattle. The person endowed with it could dispose of the milk, the male increase of the cattle, and the dead cows. This was the typical right of the client. Sometimes the same person possessed both these rights (bare ownership and usufruct).[82]

These aspects, in which the lord was a Tutsi and the client almost always a Hutu, evolved into a caste system called *ubuhake,* which was used by Tutsis for their socio-political domination in Rwandan nation-state building and in which Hutus in theory were not allowed to have cattle, a sign of wealth, power and good breeding. *Ubuhake* denoted the relation which existed between a person called *umugaragu* (client) and another called *shebuja* (lord). That relationship found its origin in the

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[80] Vidal, C., "Economie de la société féodale rwandaise", *Cahiers d'Etudes Africaines, vol. 14, no. 1, p. 350-84.*

[81] Vidal, C., Sociologie des passions, Paris: Karthala, 1991, p. 26.

[82]For a detailed study of the contractual relations, see Ruhashyankiko, N., Le droit de propriété en droit coutumier rwandais, 1981. See also Vanhove, J., Essaie de droit coutumier du Rwanda, p. 48-51, for still other, but less important, rights over cattle.

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situation in which an individual, Hutu or Tutsi, of inferior social prestige and less well provided with cattle, offered his services to and asked protection from a person whose status was higher and whose wealth was greater. In short, it can be defined as an agreement by which the client obtained the use of the lord's cattle (i.e. usufruct) and, in turn, rendered personal service to the owners. A wealthy lord was by definition a powerful man, and since a client's rights were largely dependent upon the solicitude of his lord, it was obviously to his advantage to seek the protection of the wealthy. Inferentially, the wealthier a patron the greater were the chances that he might also be a chief.

Since the Hutus were not allowed to have cattle, it was not only an economic gift but also, in some rare cases, a form of upward social mobility for the cow could reproduce, and the subsequent calves would be shared between the lord and the client. This could be the beginning of an upward social climb where, once endowed with cattle, the Hutu beneficiary would become *icyihuture* (*de-hutucised* or *tutsified*).[83] In any case, much depended on the lord, since a large number of clients, who, in the meantime, had many social and economic obligations towards their lords, would never get anywhere at all with this arrangement.

As in any agreement, the *ubuhake* system generated rights and obligations on both sides. The rights the client enjoyed over the cattle granted to him were those of usufruct: he had full rights of ownership over milk, the male increase of the cattle, and the meat and skin of a cow which had died or had to be slaughtered. The female increase of the cattle remained at his disposal but were to be taken back to the lord *ad nutum*. The interesting fact was that the cows received from a lord could be granted by the client to somebody else by a *sub-ubuhake* agreement in which the original client became a lord.[84] The lord granted protection to his client, including, but not limited to, support in lawsuits: when one was to be judged by the king, it was usual and very useful to be accompanied by one's lord whose presence impacted on the ruling to be given. Moreover, the lord extended help to his client if the latter was in a state of poverty. According to *Maquet*, if the client was murdered and his lineage was too weak to do anything about it, the lord had to demand justice from the king or even avenge his death by blood feud; and if, after the client's death, his widow and children could not be taken care of by his brothers or parallel cousins, the lord was supposed to help them.[85] In turn,

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[83]Similarly some poor Tutsis who lost all their cattle and had to cultivate the land would in due course become *umwore*, meaning fallen or *hutucised*. Marriage would tend to reinforce either trend, the children of the successful Hutu marrying into a Tutsi lineage and the children of the impoverished Tutsi marrying into a Hutu family.

[84]See Atterbury, M.C., Revolution in Rwanda, Occasional paper No. 2, University of Wisconsin, African Studies Program, p. 12.

[85]*Maquet*, Le Système des relations sociales dans le Rwanda ancien, at 130.

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the client had to pay his respects to his lord. This included personal service, which required the presence of the client at the lord's home for a certain period for accompanying the lord when he was travelling; carrying his messages; building or repairing his enclosure. In the process, in fact, there was discrimination in the treatment of the few Tutsi clients and the mass of Hutu clients on whom only services such as tilling the lord's soil or joining the night watch in his enclosure were imposed.[86]

What was important, in operation, was that the *ubuhake* agreement tended to be permanent: a son would inherit his father's obligations to a given lord and it was almost impossible to change from one lord to another.[87] This virtual inability of a dissatisfied client to escape his lord increased the exploitative potential of the *ubuhake* institution. However, this institution appears to have kept the people together, an important fact in the building of the Rwandan nation-state. This lord/client relationship involved reciprocal bonds of loyalty and exchange of goods and services. It provided a place, a status, within a hierarchical system.[88] As seen, the patrons were mostly Tutsis, but clients could be Hutus or Tutsis of inferior social status. One person could be a client as well as a patron. Even Tutsi patrons of Hutus could be clients of yet another Tutsi. Theoretically, the only person ultimately not a client of this system was the king himself. Thus, most Tutsis were clients and very few Hutus were patrons.[89] The relevant fact to be mentioned, however, is that there always were Tutsis at the top and Hutus and/or Twas at the bottom. This institutionalised relationship would be reinforced under colonial rule and would grow from bad to worse, thus increasing the frustration of Hutus.

1.2.3.2 State management

The social control which ensured state predominance over society in continental Europe entailed *infrastructural power*, the ability of the state to penetrate society and to use the infrastructure of the state to direct and co-ordinate societal actions. Effective social control requires the capability to extract resources from society and to regulate social relationships, which in turn allows the further ability to appropriate resources and penetrate society. Indicators of social control include compliance (getting people to behave differently from the way they would prefer to), participation (repeated voluntary action within institutions run or authorised by the state) and legitimacy (voluntary acceptance of the myths and symbolic imagery with which the State justifies its rules of behaviour)

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[86]See Sandrart, G., Cours de droit coutumier, Astrida: Groupe Scolaire, 1930, p. 152.

[87]d'Hertefelt, Les clans du Rwanda ancien, at 48.

[88]*Maquet*, Le Système des relations sociales dans le Rwanda ancien, at 130.

[89]Ibid.

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and are the product of rewards, sanctions and symbols which, taken together, offer "strategies for survival" that are supposed to be relevant to the particular conditions people confront in everyday life.[90]

In the dominant organisation of the Rwandan society, the king was the apex of a complex pyramid of political, cultural and economic relationships. Very closely associated was the queen mother. It was essential that this role should be fulfilled. If the death of the king's mother occurred when her son was still living, he had to be given another "mother". The queen mother had no special task, but she shared the royal prerogatives. She lived at the king's capital where she had her own court, and her protection was eagerly sought. She had herds of cattle and clients. But her role should not be regarded as independent of that of the king. Therefore, it can be said that the same kingship was realised by two persons at the same time, without any division of responsibilities of privileges. This was expressed by the term often used to designate the king together with his mother: "*abami*", meaning "the kings". In that partnership the king, however, held a predominant position: when he died, his mother lost her powers completely.[91]

Typically, as in all traditional societies, including Europe until around the fifteenth century, the three levels of human action, i.e. political, cultural and economical, were deeply enmeshed and could not be prised apart. As already indicated, apart from the central government, there were under the king, in each district, the chief of land holdings, the army chief and then the chief of pastures. These three functions could be concentrated in a single person for a certain area, but in a difficult or rebellious area, the king could separate all three positions and give them to different men according to the principle of "divide and rule". The military chiefs were given full control over the frontier districts and their functions were both offensive and defensive, carrying out cattle raids on neighbouring groups, as well as protecting the frontiers. It frequently occurred that the "Great Chief" was also named an army chief. *Nyrop* has observed that over 95 percent of these administrative posts were held by Tutsis and, in order to make everything even more complicated (something the king rather relished), the same man could be "chief of men" and of grazing lands on a certain *umusozi* (hill) and have to put up with a rival as the chief of pastures on "his" hill, while at the same time also being the military chief for a couple of different hills where the rest of the power was held by third parties.[92] These chiefs, like all the administrators of all governments, were there basically to play two roles: controlling

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[90]du Toit, State-building and democracy in Southern Africa, at 22-23.

[91]For a detailed study on the kingship, See Mbonimana, Critique Historique, p. 23.

[92]Nyrop, F.R., et al, Area Handbook for Rwanda, Washington DC: US Government Printing Office, 1978, p. 8.

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and extracting. The controlling role varied: close to the central core of the kingdom it was very tight, but it became ever looser as one approached the periphery. The role of extracting took several forms. In addition to in kind taxes, peasants had three straightforward duties: maintaining the chiefs" enclosures[93], working the land[94] and minding the cattle. [95]

This development is central to an understanding of social stratification favouring a minority rule. It would be fair to conclude that the very fact that a lucky Hutu who successfully made his way up the social ladder should *ipso facto* be considered socially to be on the same level as the ordinary Tutsi who had no property (he could, for example, marry a Tutsi woman from an ordinary family) shows that as a group, the Hutus were inevitably destined to remain in an inferior position.

Polarisation of groups within a society implies the presence of both bonds and cleavages. Even in plural societies dominated by minorities and characterised by extreme discontinuity between social, ethnic or religious groups, there are nevertheless many harmonious relationships which transcend the sectional divisions.[96] *Kuper* has defined the process of polarisation as "a process of the attenuation of the bonds linking together members of different groups, and the accentuation of the divisions between them".[97] In structural terms, polarisation can be defined as "the increasing aggregation of members of the society into mutually exclusive and hostile groups. It is associated with a simplification of the social structure and a corresponding simplification of issues into ideologies, which portray the society as polarised into antagonistic groups with incompatible and irreconcilable interests that render inevitable the resort to violence".[98]

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[93]Called *kwubaka inkike*.

[94]Called *gufata igihe*.

[95]Called *ubushumba bw'inka*. In the late nineteenth century a new form of compulsory work not previously known to the peasants, called *uburetwa*, was introduced. This is undoubtedly a late introduction since there is no "kuleta" verb in Kinyarwanda (the Rwandan language) from which such a substantive could be derived (the wa suffix indicates a passive form). But there is indeed such a verb in Kiswahili where *kuleta* means "to bring". So the *abaletwa* are "those who are brought" and *ubuletwa* is the situation of being brought for the disposal of the master. And Kiswahili was the new grinding language which began to reach Rwanda along with the advance of the coastal Swahili merchants from Zanzibar in the nineteenth century. See Mworoha, E., Peuples et Rois de l'Afrique des lacs, Dakar: Les Nouvelles editions Africaines, 1977, p. 232-3; Newbury, C., "Uburetwa and Thangata" in Centre de Civilisation Burundaise (ed.), La civilisation ancienne des peuples des Grands Lacs, Paris: Karthala, 1981, p. 138-47. *Uburetwa* was supposed to be for works of "public interest". It was spread by King *Rwabugiri,* as he extended his dominions in the late nineteenth century, and was seen everywhere it came as a hated symbol of centralist oppression. Later, the Belgian colonisers would greatly favour it and abused it, thus, deepening the frustration of Hutus.

[96]Newbury, Id.

[97]Kuper, L., The pity of it all: Polarisation of Racial and Ethnic Relations, Minneapolis: University of Minnesota Press, 1977, p. 247. It can be argued, as Höglund supports it, that polarisation is a process which may be traced at the different levels of organisation, of ideology and of interaction. *Höglund, B., Concept of conflict, Report No. 2, Department of peace and conflict research, Uppsala University, 1970, Ch. 2.*

[98]*Maquet*, Le Système des relations sociales dans le Rwanda ancien, at 165.

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Many factors contributed to the polarisation of the Tutsis and Hutus in Rwanda, but the catalyst was the violence precipitated by the struggle for power in the movement for independence. The author's concern here is the social basis of the polarisation that is to be found in the traditional structure of the caste society. In this regard, *Lemarchand* emphasises the significance of common values in maintaining this structure. He writes that "the caste structure of Rwanda was based on a shared and "culturally elaborated" image of society, involving a combination of exclusiveness and reciprocity, of inequality and solidarity".[99] For *Maquet* this premise of inequality was based on the concept that "people born in different castes are unequal in inborn endowment, physical as well as psychological and have consequently fundamentally different rights". He argues that the acceptance of inequality was a basic principle influencing the whole structure of Rwandan life.[100]

Other scholars have pointed out that it is difficult to estimate the significance of different elements in the structure and culture of a society in the ordinary course of social life, and that it is moments of crisis, of disjunction, which illuminate the normal, and make it more comprehensible.[101] Since the picture presented by *Maquet* was of traditional Rwandan society, it is important to refer to the period after independence, when crises occurred, to show how the famous premise of inequality was undermined by the introduction of human rights and democratic principles in the Rwandan philosophy, as it was in other developing societies.

The rapidity of the polarisation in Rwandan society may suggest that acceptance of the premise of inequality was not so deeply rooted, or that it was coloured by much ambivalence. The premise of inequality represents an underlying system of ideas which functioned as one of the elements integrating Tutsi pastoralists and Hutu agriculturalists in the traditional society. There was, as already seen, a variety of other structures also serving integrative functions: the carrying of similar clan names by Tutsis and Hutus, suggesting some minimal solidarity; the participation of Hutus in the army; membership in the same *Ryangombe* religious sect; a system of clientism linking individuals in a unified economic system through which agricultural and pastoral products were distributed throughout the society; a plurality of structures in which individuals were affiliated; and the role of the ruler, the *Mwami*, as representative of the deity, and as king, father and protector of the country.[102]

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[99]Lemarchand, Rwanda and Burundi, at 34-35.

[100]*Maquet*, Le Système des relations sociales dans le Rwanda ancien, at 165.

[101]See the discussion of this point by Jan Mejer in his dissertation, The May Events: A Theory of Disruptive Crisis, University of California, Los Angeles, 1976: Ch. 1.

[102]*Maquet*, Le Système des relations sociales dans le Rwanda ancien, at 148.

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The fact remains, nonetheless, that Rwandan nation- and state-building was accomplished through Tutsi minority domination over the remainder of the population and the philosophy of this domination gave birth to the polarisation of ethnic relations.

1.2.4 Factors for the Hutu-Tutsi polarisation

Apart from the ultimate control of a most valuable resource, namely cattle, the difference between the equipment of Tutsis and Hutus was not very considerable. As observed by *Maquet*, it is possible that, when the Tutsis first came into the country, the difference was greater than during the period that followed. It was not, however, to be compared, for instance, with the difference existing between the material cultures in Central Africa of the Europeans and of the Africans during the nineteenth century and at the present time. A large and complex material culture is one of the most important factors, not only in conquest but also in the maintenance of a dominant group's superiority. Motor vehicles, permanent dwellings, electric power are so fundamentally different from the traditional Central African means of transportation and habitation that it is easy for those who have the almost exclusive use of them to maintain high prestige and great power.[103] Except for cattle, Tutsi material equipment did not allow them to impress the idea of their superiority on Hutu minds to a comparable extent. Certainly they had more spacious compounds, they were better dressed than the Hutus, they drank better beer and when travelling, instead of walking, their Hutu or Twa servants frequently carried them on a litter. All these differences, important as they were, however, were only differences of quantity and degree, characterising two strata with unequal access to the good things of life, rather than essential differences. By "essential" here is meant that the Tutsi equipment did not include elements such as steam machines, electricity or gun-power, which, when possessed exclusively by one group, are sufficient to secure an easy physical domination and thus a related cultural (mental) domination of such a nature that the dominated come to see that domination as natural.

The second factor was demographic: the ratio of Tutsis to Hutus. As there was no census, it is not possible to know that ratio very accurately. However, as affirmed by some observers, it most likely was "never greater than ten or fifteen per cent. This fact was important, because an economic exploitation of land tillers for the benefit of cattle raisers would have been impossible if the Tutsis had numbered much more than this percentage of the total population". [104] If, for instance, the Tutsis had

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[103]Ibid.

[104]See Paternostre de la Mairieu, at 45; Delmas, Généalogie de la noblesse du Rwanda, at 110; *Maquet*, Le Système des relations sociales dans le Rwanda ancien, 201..

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constituted fifty per cent of the population, the Hutus would not have been able to provide them with the foodstuffs and labour necessary for comfortable subsistence.[105]

The third factor, which made the second so crucial, was the type of economy. Because of the relatively poor soil, the irregularity of the rains in some regions, and the exploitation of land without respite, there was little surplus. Having to subsist on a limited national income, the rulers had to organise a way of life with insufficient means to meet needs. This emphasised the importance of compulsory labour and tributes, of regular and efficient collection, and of an apportionment of levies that did not let any prospective taxpayer escape. Although limited national resources may be adverse to the centralisation efforts of a government that usually requires a complex machinery - agencies, army, messengers, civil servants, local delegates, etc. - such an organisation was nevertheless built up in Rwanda.

The fourth factor was biological - the difference in appearance between Tutsi and Hutu. Significant characteristics were, for the Tutsi, to be slender, tall, and light-skinned; for the Hutu, to be short, stout and dark with coarse features. However, to conform to one of these types was not sufficient to make of a man a Tutsi or a Hutu, because there were Tutsis and Hutus who did not possess the physical characteristics of their caste.[106] It is immaterial whether the stereotypes are verified in the majority of cases, or only quite rarely. What is important is that

> They provide a basis on which many moral, psychological and occupational characteristics are crystallised and form a simple picture. This picture, haunting the imagination of those it is supposed to represent as well as of the others, makes everyone extremely conscious of his group participation and of the differences that separate his group from the others.[107]

The fact that a group is characterised by a physical type that differentiates it from the others is a factor which may act both ways from the standpoint of social and political power: as *Sadin* and *Maquet* observe, a minority endowed with a stereotyped physical appearance will have great social

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[105]One wonders whether this demographic factor was a purely natural fact completely beyond Tutsi control or whether they tried to maintain that fortunate proportion. According to *Maquet*, Tutsi made it difficult for a Hutu to enter their caste, but this should not mean that they favoured a restriction in the number of their group and an increase in the Hutu group. *Maquet,* Le Système des relations sociales dans le Rwanda ancien, *at 145.* The fact that they shared with the Hutu a high valuation of fertility and appreciated families with numerous offspring is enough to support such a way of thinking. Moreover, it should not be forgotten that, if a decrease in population would have contributed towards giving each member of the Tutsi caste a greater share in the wealth of the group in an imperceptible degree, for the individual to have many children was a way to obtain also a greater share of wealth in a very perceptible manner. It is to be suspected that the latter consideration was much clearer than the former for any Tutsi. It is also questionable whether the bringing about of the first situation would have been psychologically compatible with the attitude of self-assertion of a domineering caste of warriors. At all events, up to now the demographic situation of Rwanda has been a factor favouring, even making possible, economically unfair exploitation of a majority by a minority.

[106]Sadin, Folie de Grandeur, at 44.

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visibility. If that minority is at the bottom of the hierarchy, its members are constantly despised, and develop attitudes characteristic of those who are looked down on by those with whom they have to live. If, on the contrary, that physically stereotyped minority is at the top of the power structure, it avails itself of its appearance, regarded as "beautiful", to support its claims to an innate superiority.[108] Whereas, for the Twa, their physical stereotype stressed all the features which could be interpreted as "ape-like", Tutsis have been able to use the three different stereotypes of the physical characteristics of the Rwandan castes as a confirmation of their superiority: they have convinced all Rwanda that to be slender, tall and light-skinned is much better than to be stout, short and dark.[109] They used the stereotypes as a proof of their different nature and entitlement to rule and as a guarantee against social mobility: because a Hutu was usually not endowed with the Tutsi physical characteristics he could not "pass" as a Tutsi even if he managed to increase his economic power.[110]

The fifth factor comprises the Rwandan extent and orographic configuration. The country is small, about 250 kilometres from north to south and 324 kilometres from west to east. But its relief is "that of a maze of hills, many of them very steep, separated by deep valleys". It is traversed, from north to south, by a chain of mountains that separates the Congo and Nile basins and is covered with dense forests. It is obvious that a centralised government needs good communications for the king to remain, as much as possible, in constant contact with all the regions of his country, for tribute to reach the capital regularly, for armies to arrive rapidly in any place threatened by an external enemy, and for local authorities not to be left isolated lest they become too independent. The small extent of Rwanda was indeed an asset from this point of view, but this was largely neutralised by the geography, which made communications extremely difficult. Notwithstanding these unfavourable physical factors, the king was able to establish and maintain his political network connecting all the subordinate authorities of Rwanda to himself.

The aforementioned factors may be said to be the only ones that underlined the domination system of the Tutsi. In section two, it will be seen that the Europeans, when they arrived in Rwanda, favoured this domination instead of opening the minds of Rwandan people by educating them on the impact this big difference was going to exercise on democratic rule and human rights in modern Rwanda.

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[107]Id., at 51.

[108]Ibid.; *Maquet*, Le Système des relations sociales dans le Rwanda ancien, at 146.

[109]This was even aesthetically translated in the patterns used in the ornamentation of baskets: they manifested a preference for slim elongated forms.

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1.2.5 Polarisation and national unity

In order to retain the dominant position for their caste and its rulers, the Tutsi had to monopolise social and political power without preventing Rwandan society from existing and functioning as a unit and to realise an equilibrium between the necessities of social life and the necessities of the permanent dominion of a group.

In their case, specifically, it was how to resolve antinomic issues: how to maintain a caste society and promote the cohesion of the society as a whole? How to both exploit and protect the lower stratum? How to manage a centralised and absolute government but delegate powers to subordinate authorities?

1.2.5.1 Caste society and social cohesion

In order that the members of a dominant and hereditary group may keep their privileges, it is necessary that what gives prestige remains exclusively under their control. As already indicated, in Rwanda the basis of social power and prestige lay in the effective disposal of cattle: the feudal system permitted the Tutsis to keep complete control of all Rwandan cattle, as the whole of a client's cattle was always liable to be confiscated by the lord under any pretence. Moreover, outside the *ubuhake* structure, the king had the pre-eminent right over all Rwandan cattle. Even if he did not frequently use his rights against Hutus, they were not forgotten: the very cows which were not received from a lord but acquired by one's own efforts and over which the possessor had usufruct plus bare ownership, were called "*inka z'umwami*" (king's cows).

As *Sadin* has observed, an upper caste usually shows its superiority by, among other things, its leisure and pleasant life. It has to enjoy a greater share of the good things of life than the commoners do and it has to get this apparently without effort, rather as a right than as a reward for specific tasks.[111] It would be fair to say, again, that the *ubuhake* made it possible for the Tutsi caste to enjoy "gracious living" becoming to its high social status. The man in control of a herd of cattle could, through the clientele institution, live without having to participate in the manual work of the production processes. However, it was the lack of internal coherence ("all men are born equal" versus "political and economic power is restricted to those who are descendants of the conquerors") which rapidly resulted in a caste system. This caste system evolved into a class society. It is

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[110]Ibid. In a few cases, however, a Hutu who had a certain number of cattle could be allowed to marry a woman from a *pétit* Tutsi family but could not accede to a political position. Rwandans call this type of Hutu *"icyihuture"*.

[111]Sadin, Folie de Grandeur, at 61.

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probable that the Tutsi adopted it, not only for consistency's sake, but because it is more efficient, more easily understood and accepted, particularly when different physical traits are characteristic of each caste. This does not mean that Tutsis, one day, made a conscious choice among various possible ideologies. But once a caste system operates, the patterns of political domination and of economic exploitation require people to behave as if the upper caste members were by nature different from that of the lower caste, and when the "idea behind" these behaviours is made more or less explicit, as in tales and proverbs, it is rationalised in terms of inequality.[112]

A third requirement for the maintenance of caste identity is the preservation of the group's *esprit de corps* and traditions and their transmission from one generation to the next.[113] This was done in the kinship groups, mainly by the grandparents, particularly paternal grandfathers. But a multiplicity of kinship group agents cannot be entrusted with a function as important for the caste as the socialisation of its young members and their training in the qualities and virtues that had permitted their forbears to obtain power. Consequently, formal institutes of education and instruction were set up in Rwanda by Tutsis. The *intore* companies in which every young man of the Tutsi caste spent several years, fulfilled these functions.[114]

The tendency that leads a powerful group to constitute a closed caste, to maintain jealously its advantages, and to try to increase them, cannot be left without something to counter-balance it. Each caste, as *Linton* observes, is a society in itself. If the caste accentuates the characteristics which make it a socially complete group, isolated in the society of which it is only one layer too much, the cohesion of that society may be destroyed. Consequently, powerful factors of cohesion are needed to check the tendency towards social disintegration that exists within any caste structure.[115] Solidarity factors have already been described. They may be summarised here.

First, there are certain groupings in which Tutsis and Hutus were to be found together. Names of the Tutsi and Hutu clans were similar. This suggested a certain solidarity among the bearers of the same clan name, however minimal. A comparable kind of Hutu participation existed in the armies. It is possible that the fact of having been commonly associated in dangerous circumstance gave a deeper feeling of unity to Hutus and Tutsis. The *Ryangombe* religious sect was open to Hutus and Twas, as well as to Tutsis. Rwandans still say that *Ryangombe* himself has addressed his invitation

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[112]Id., at 37.

[113]Ibid.

[114]For details about this subject, see d'Hertefelt, Les clans du Rwanda ancien, 39.

[115]Linton, R., The Study of Man, New York, 1939, p. 130.

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to join to every Rwandan, explicitly calling the Tutsi, the Hutu, the Twa, the men and the women.[116] As initiation rituals took place among kinsmen, however, there was no real inter-caste mingling in the ceremonies. It may be said that clan, army, and sect were only nominally and superficially "national". Notwithstanding, these associations between Hutus and Tutsis probably had some limited significance from the standpoint of social cohesion.

In that connection, *ubuhake* is a much more important factor. Through the clientele institution, Rwanda constituted a unified economic system that distributed agricultural and pastoral products among the totality of the population. The personal bond with a privileged caste member and access to possession, however precarious, of cattle, seem to have been essential from the point of view of national solidarity.

A third integrative factor was the "accession to the nobility", even as limited as it was in Rwanda. It has been noted that the number of Hutus assimilated with Tutsis because of their holding of political offices or because of their wealth has always been very tiny. In this regard, *Maquet* observes that the possibility of being accepted into the superior group, even if it is illusory for almost all the members of the inferior group, has a very great integrative influence in many societies. He refers to the situation in the United States of America where, during the first quarter of this century, the fact that a few men among the wealthiest of the country had been born poor, greatly contributed to the psychological solace of a considerable mass of men and women who personally had no opportunity to achieve such brilliant successes. In addition to individual comfort, the belief that there was no intrinsically insuperable obstacle (such as having been born outside a closed hereditary group) helped Americans to feel that they were all members of the same nation regarded as not significantly stratified.[117] This does not imply that the social ascent of a few Hutus has played a similar part in Rwanda. Firstly, there was no egalitarian ideology, which makes the fact that one is obliged by birth to live in an inferior social group almost unbearable; secondly, cases of inter-caste mobility were

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[116]De Lacger, Le Rwanda ancien et le Rwanda moderne, at 257. The part played by religious sanctions – in particular by the cult of *Ryangombe* and the *Kubandwa* sect, to which it gave rise in promoting inter-caste cohesion - was significant. In his work on Rwanda, Luc de Heusch advances the hypothesis that the *Kubandwa* sect, by ritualistically reversing the established hierarchy among castes, inaugurated at periodic intervals a kind of fictitious egalitarian order which, in turn, served as a safety valve for accumulated tensions and antagonisms among castes. "The *Kubandwa* introduces a democratic religion which negates the divisions of the real society founded on the ownership of cattle ... . The author does not accept the functional interpretation offered by *Maquet*, according to which the *Ryangombe* cult would only serve as an additional factor of cohesion, uniting into a single belief system members of different castes ... .The ritual of the *Ryangombe* rested on a mystical and radical negation of the established order": Luc de Heusch, *Le Rwanda et la Civilisation Interlacustre*, Brussels: Institut de Sociologie, 1966, p. 172. This interpretation of the *Kubandwa* sect, as providing its adherents with a *rite d'inversion* through which a temporary flight from reality could be achieved, is challenged by Claudine Vidal in "Anthropologie et Histoire: le cas du Rwanda", Cahiers Internationaux de Sociologie, Vol. XLIII, 1967, p. 143-57.

[117]*Maquet*, Le Système des relations sociales dans le Rwanda ancien, at 171.

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extremely rare in Rwanda. Nevertheless, these cases were a proof for Hutus that, although not belonging to the upper stratum, they were members of the Rwandan nation together with Tutsis. "They did not feel that they were out-group people."[118]

A fourth factor that counterbalanced the socially disintegrative influence of the caste system was the plurality of the structures with which any Rwandan was affiliated. Through several structures, subjects were much more efficiently bound among themselves and to their rulers than in a single hierarchy. Almost any Rwandan was dependent on the king through two hierarchical channels: via his hill chief (who himself was subordinated to the cattle chief and the land chief) and via his army chief. In addition, the feudal system integrated him into a set of personal loyalty relations such that the person occupying the superior position in one of these relations is himself an inferior in another relation. It should also be mentioned that any Rwandan was a member of three kin groups: primary and secondary patrilineages and clan. Of course kinship affiliations as such did not cut across caste lines, but as many of these kinship groups had been established for so long in Rwandan territory, they were certainly a supplementary link between the individual and his country. The network of relations woven by the political and client systems was particularly important in a country where there were no clear-cut groupings based on co-residence. This has led some observers to believe that "Rwandans were living in a kind of social vacuum".[119] On the contrary, a Rwandan was never isolated: his social links connected him with the authorities and were ramified, if not in the whole territory, at least in a large area of it.

The last factor of social cohesion to be mentioned here was the ideology developed around the monarchic institution. The *Mwami* was regarded by all as the king of all Rwanda and not only of the Tutsi. His divine origin, which separated him from men, bestowed on him an authority that no commoner thought to question. He was, as seen, closely connected with *Imana*, conceived as a supreme god, rather remote, but benevolent. The *Mwami*, representative of *Imana*, was the father and protector of all Rwandans.[120] Was it not enough to assume towards him a filial attitude and to

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[118] Ibid.

[119] Ibid. See also Meisel, J.H., The myths of the ruling class, Michigan: Ann Arbor, 1958, p. 32.

[120] The nature of the *Mwami*'s power was sacred rather than profane and he physically embodied Rwanda. For example, when Count von Götzen shook hands with the King, all the courtiers were terrified: not only had the bizarre stranger actually "touched" the *Mwami* without his authorization, but the shaking of his arm might cause an earthquake since he was the personification of the hills of Rwanda. Even the vocabulary relating to his daily life was special, with special words to mean "the King's speech", "the King's bed" and so on. He was "the father and the patriarch of his people, given to them by *Imana* (God). He is the providence of Rwanda, the Messiah and the savior. When he exercises his authority, he is impeccable, infallible. His decisions cannot be questioned. The parents of a victim he has unjustly struck bring him presents so that he does not resent them for having been forced to cause them affliction. They still trust him, because his judgements are always just. Whatever happens, he remains *Nyagasani*, the only Lord, superb and magnificent" *De*

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feel one's dependency upon him? As in many cultures in which a king is a paternal and divine image, the Rwandan monarch certainly contributed towards creating, in Rwandan individuals, a feeling of belonging to a unit which presented some similarities to a family.

This was, it seems, curiously, how the Rwandan political and feudal structures by their complexity succeeded in maintaining an equilibrium between the tendencies towards social disintegration that a caste system necessarily produces, on one hand, and on the other, the minimal cohesion necessary for the maintenance of a social unit such as a nation.

1.2.5.2 Exploitation and protection of Hutus

According to *Schutyser*, the Tutsis were confronted with the dilemma that all conquerors must solve when they settle a new territory with the intention of staying on permanently: are they going to draw upon the natural resources of the country themselves, using their own labour and equipment, and remove from the area the aboriginal inhabitants by pushing them further on and even exterminating them as a people, or are they going to let them stay and use them as cheap labour? Europeans who settled in North America adopted the first solution; they did not attempt to use Indian labour but rather expelled the native population from their hunting areas and began to cultivate their country using imported slaves from Africa. The second method was chosen in most parts of Africa south of the Sahara where Europeans settled.[121] Whether Tutsis explicitly considered this problem is immaterial here. In fact, they adopted the solution which was most advantageous to them: being pastoralists and not numerous (in comparison with the Hutu peasants), they had no interest in expelling the Hutus. If this had been done, they either would have had to till the land themselves or to dispense with beer, peas, sorghum, etc. It was preferable for Tutsis to adopt what *Oppenheimer* calls the "bee-keeper's policy" (as opposed to the "bear's policy" who, for the purpose of robbing the beehive, destroys it),[122] that is to say, to keep peasants in the country in order to permanently exploit their productive work.[123]

Lacger, Le Rwanda ancien et le Rwanda moderne, *at 119. For description of the nature of the Rwandan monarchy, see Pagès, A., Un royaume hamite au centre de l'Afrique, at 491; Maquet,* Le Système des relations sociales dans le Rwanda ancien, *at 146-7 and 178-80. For a view of the place of the Rwandan royal myths and rituals within the interlacustrine cultures, see Mworoha, E., Peuples et rois de l'Afrique des Lacs, 1977.*

[121]Schutyser, L., People and social domination, Nairobi: Djima, 1975, p. 83; *Maquet*, Le Système des relations sociales dans le Rwanda ancien, 10.

[122]Oppenheimer, The State, New York, 1922, p. 65.

[123]This is also one of the reasons why the RPF will spare a number of Hutu during the massacres preceding, accompanying and following the 1994 genocide perpetrated by Hutu elements on Tutsis, when, as indicated in Chapter two, everything will result in a take-over of the rulership.

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As seen, the country's surplus resources were drained and concentrated in Tutsi hands through the political and feudal structures. From that point of view, it is important to distinguish two categories. In the first, there is the king, the court, the intermediary military and administrative chiefs, who can be called the rulers; in the second, the ordinary Tutsi. The rulers received tributes and labour through the military and administrative channels; the second received fewer consumption goods directly, but mainly labour by the *ubuhake*. Thus, the satisfaction of the needs of the superior caste was not obtained by economic means but by social pressure and political power.

But how heavy were these services in labour and in kind for the Hutu caste? *Maquet* remarks that it was not too painful an obligation for nine-tenths of the population to support one-tenth. But one should not forget that it was an economy based on rudimentary techniques and did not yield a large surplus. Moreover, the standard of living of the dominant group was much higher than that of the inferior castes; one may thus safely assume that Tutsis consumed much more than a tenth of the total production.[124]

One can imagine that the social and political power enjoyed collectively by the Tutsi caste was so great that it must have been a permanent temptation for them to increase their demands on the Hutu group. Such a situation was indeed at the same time both advantageous and dangerous, as it carried in itself the seeds of its own destruction. For if the Tutsis exceeded a certain limit of measures of the impositions (and the technological and environmental circumstances made the margin very narrow), the subordinate group would be weakened and its productivity would diminish. Eventually, it might be made to leave the territory or to revolt. To prevent such detrimental events was all the more difficult as each Tutsi was endowed with so much individual social power that he might be inclined to misuse it.

This threat was dealt with, firstly, by a universal distribution of the levies obtained through the military and administrative structures. Every familial unit of production was obliged to contribute - certainly not equally -, but the mere fact of having universal impositions tended to prevent considerable differences, because a sufficient return was secured and rules were established. These rules were not as fixed and publicised as were the fiscal laws in Western society, yet the mere fact of their existence ensured certain guarantees, like the lord's protection. For the client services, what each client had to give or do was less clearly determined and depended more on the lord's wishes.[125]

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[124]*Maquet*, Le Système des relations sociales dans le Rwanda ancien, at 111.

[125]For details, see Karemano, Rwanda Traditionnel, at 149-198.

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However, when one belongs to a single structure, there is only one immediate superior. Consequently, everything has to be obtained from him and is owed to him. In a plural system, there are several immediate superiors of approximately equal rank who are not necessarily interdependent though belonging to the same group. Consequently, it is possible to have the support of one chief (or his complicity even) when resisting another. This is what happened in Rwanda. *Ruhashyankiko* explains:

> Suppose a Hutu had inherited cattle granted by a lord to his grandfather who had also received cows from his army chief, and who had acquired other cattle by exchange of goods (*imbata*), and because his present lord was too exacting, our Hutu wanted to change and become the client of another important man. He knew that his lord would try to seize all his *imbata* and choose the best cows among his other cattle. By some gifts, he obtained the support of his army-chief. Before entering into discussion with his lord, he and his army-chief had agreed that all the best cows he had at his disposal and all his *imbata* would be said to have been received from the military chief. They were removed and put on grazing grounds directly protected by the army-chief. Then when the lord claimed more cows than his client wanted to return to him, he had to settle the matter not with a man of very limited power but with the army-chief.[126]

Of course this required clever handling of the situation, but in cases where it succeeded, it secured efficient protection against extortion.

It should be added that the recourse of a subject to a higher authority within the same hierarchy was "approved and even encouraged" in Rwanda. This was another means of putting a check on the exorbitant demands of immediate superiors. This, however, did not play an important part in the feudal system because there were no socially recognised ties between a client and his lord's lord. Feudality was not a ranking system in the same sense as was the political structure. "Each lord had his personal following; he was not as such the representative of a higher authority."[127]

Briefly, the political and client structures simultaneously secured the economic exploitation of the Hutu and protected them against an exaggerated pressure which could have led to disaster for the upper caste.

1.2.5.3 Delegation and centralization of political power

Before the European occupation, the kingdom's population was already numerous. It was estimated at about 2,000,000 inhabitants.[128] The orographic configuration of the country made communication

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[126]Ruhashyankiko, Le Droit Foncier Rwandais, at 151.

[127]Ibid.

[128]*Maquet*, Le Système des relations sociales dans le Rwanda ancien, at 138.

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difficult. In that non-literate culture, an efficient collection of tributes required almost a face-to-face acquaintance between the subject and his ruler. These circumstances necessitated a delegation of authority to many intermediary chiefs who would be the local representatives of the rulers.[129]

But such an unavoidable system was dangerous for the central government. Its subordinated agents frequently having authority over a rather numerous population which could provide them with abundant supplies (if nothing was sent to the court) could be tempted to isolate themselves completely from the capital and become independent. The military structure and the feudal system would have facilitated such a course of action. Some important chiefs were, indeed, authorised to raise an army. Moreover, any military chief whose army was encamped near the border, in a district far from the capital, could gain such ascendancy over his warriors as to win over their allegiance to himself.[130]

The *ubuhake* was still more dangerous because, as in any feudal system, it created personal bonds of allegiance between the client and his lord. As such, that bond of loyalty did not extend beyond the lord. One had to obey one's lord because he was one's lord and not because he was a king's representative. This is why "any feudal system has always been so dangerous for a central government". Independence and revolt against the king have been recurring events in the areas where a feudal system existed.[131]

Rwanda's rulers were able to check these tendencies towards political fragmentation, first, by the ritual character of royal power. To revolt against the king, identified with Rwanda and supported by God, was sacrilege. It is not claimed that such a theory was sufficient to secure the kings" effective power indefinitely. Elsewhere similar ideologies of absolute and divine power of the monarchs did not prevent some of them from being stripped of their real authority, whereas their divine prerogatives were still respected.[132] Secondly, the king kept at his disposal the coercive force of the armies. Even if the rebel had the support of one or two armies, the king had all the others. But the main factor that

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[129]Ibid.

[130]For a detailed study on the Rwandan army, see Kagame, A., La poésie pastorale au Rwanda, Elisabethville, 1947, p. 791-800.

[131]Sadin, Folie de Grandeur, at 241.

[132]Schutyser, People and social domination, 105. The ritual sanction does not seem to have had a primary importance in the maintenance of submission to the Rwandan kingship. In 1896 or 1897, a young king, *Mibambwe IV Rutalindwa*, was assailed and eventually lost his life in a revolt instigated by the brother of the queen mother. That queen mother was not the mother of the king but another wife of his father. Her clan, the *Abega*, wanted a son of hers as king. This shows that when the king lost effective control of power, ritual sanctions were not an effective safeguard for his prerogatives, or even for his life. This is why it has not been thought necessary to expand on the ritual aspect of Rwandan kingship. But it certainly was a factor that contributed to the obedience of the Rwandan nobles.

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probably prevented local authorities from asserting their independence from the central government was the plural character of the political and feudal organisation. In connection with the maintenance of the effective power of the central government, this plurality of structure was a very effective means of maintaining misunderstanding, hostility, and jealousy among the subordinate chiefs. It is certain that the lord, in the example given by *Ruhashyankiko* in the preceding section, would have been only too glad to denounce to the king the army-chief if the latter was indulging in suspicious manoeuvres. The co-existence of chiefs of almost the same rank who were constantly induced by their subjects to take sides in disputes was sufficient to create mistrust among them. Moreover, conflicts were numerous, particularly when two chiefs had the same territorial power (as in the case of the cattle and land chiefs). To settle conflicts, they had to resort to the superior authority's judgement and this increased the ruler's power over his subordinates.[133]

This applied not only to the political organisation but also to the feudal structure, which had potentially the most disruptive action on a centralised government. Indeed, the subject-client often had to ask for protection and support from his political chief against his lord and from his lord against his political chief. Consequently, relations were often very tense between the important lords, even those who were not themselves prominent in the political hierarchies, and the political chiefs. Moreover, as the very important lords who could have attempted to resist the central government held political offices at the same time, they were directly enmeshed in rivalries and jealousies.[134]

Engendered by the hierarchic plurality, the mistrust which prevented the subordinate chiefs from uniting against the central government, which led them to spy on each other and to inform the king of anything suspect, was the main check against tendencies towards local autonomy in Rwanda. Even if the hostility between important Tutsis happened to express itself openly and violently, the central government was always able to restore peace as long as troubles remained localised and did not threaten the regular collection of taxes and the authority of the king.[135]

1.2.6 Polarisation and consolidation of the political organisation

At the beginning of the twentieth century, the Rwandan political organisation was an instrument of social immobility. It was not a force of expansion meant to increase the Tutsi dominion over the country, but machinery that succeeded in maintaining a difficult equilibrium between the antinomic

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[133]Ruhashyankiko, Le Droit Foncier Rwandais, at 86.

[134]Ibid.; Mbonimana, Critique Historique, at 57.

[135]Ibid.

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tendencies that have been reviewed. Despite *Schutyser*'s observation that "any institution in which divergent tendencies meet and are kept balanced bears in itself the principle of its own disintegration"[136], the equilibrium problem in Rwanda had been so efficiently solved that it may seem that an optimum point had been reached. What was "immobilised" by the political organisation was the almost exclusive control of power of the Tutsi caste and rulers. They used it for exploitation, by which is meant here the satisfaction of needs; not by economic production, but by expropriation of results. The writer here closely follows *Oppenheimer*'s distinction between economic and political means. Both have the same end, he writes, the satisfaction of needs. But when this end is obtained by one's labour and the equivalent exchange of one's own labour for the labour of others, one may speak of economic means, while the unrequited appropriation of the labour of others, through taxation, for example, is "political means".[137]

It would, of course, be completely misleading to assume that Rwandan political organisation had as its only function the preservation of Tutsi exploitation. The inferior castes enjoyed security through the political structure. Collectively, peasants were protected against raiding expeditions by neighbours and against an unlimited and too arbitrary exploitation. *Maquet* found that, individually, in the difficult or dangerous events of life, a Hutu could rely upon the protection of his lord, of his army chief, and of his administrative chiefs, if he could not or did not wish to ask for the aid of his lineage.[138]

In short, this political system opened grounds for injustice, for it was a means of maintaining a certain social order in which the group of rulers and their caste appropriated for their consumption a considerable part of the country's goods without having to use their labour in the production processes. The success of this system was due to a number of stratagems that nibbled at the roots of the Rwandan State. The most fundamental include the following:

1.2.6.1 Politics

Between the development of statehood, on one hand, and the pattern of nationhood, on the other,

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[136]Schutyser, People and social domination, at 110.

[137]Oppenheimer, The State, at 25. This should, however, be qualified in the *ubuhake* where the client received the usufruct of cattle.

[138]*Maquet*, Le Système des relations sociales dans le Rwanda ancien, at 137. In his analysis, Kayitare speaks of a counterpart and interprets the Tutsi privileges as a retribution for the care of the commonwealth and public order. He defends the thesis that the political organisation in Rwanda fulfilled different functions (*Kayitare, L'Organisation politique dans le Rwanda Traditionnelle, at 12*). However, the foregoing discussion has shown that one function is not the counterpart of the other merely because it benefited different groups. It just so happened that two different functions were fulfilled by the same set of institutions.

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comes the acquisition of political rights that are binding on agents of the government by the members of the nation within the subject population. In this regard, the king - who also assumed the functions of judge and supreme court - and all army chiefs were Tutsis, and so almost without exception were the cattle chiefs.[139] As regards the army, although it had a multi-"ethnic" composition, it was clearly stratified in that all higher military offices were held by Tutsis, followed by Hutus, and finally, Twas in the lowest ranks. Moreover, by the end of the nineteenth century, many areas of the Rwandan kingdom had developed a complex and highly-organized administrative structure encompassing provinces, districts, hills and neighbourhoods. Tutsis administered all these entities except in some cases where the "chief of land" was a Hutu.[140] There was no real power-sharing in the State's activities, for these were the monopoly of "mono- or uni-'ethnic' Tutsi"[141] and, indeed, as *Codere* aptly puts it,

> Based on the case of Ruanda the position arrived at ... is that power can be held and exercised by a minority against the interests and without the consent of the governed; that this state of affairs can last for long periods of time; that power is a factor ... capable of shaping a kind of social order that becomes the only kind known to the people; and ... that revolution is a possibility.[142]

From this observation and earlier developments, one can remark that the problems of traditional Rwanda - general problems of livelihood, security of life, from want, disease, or the violence and destructiveness of other men, for example - lay in an interrelated system of physical, social and ideological problems which were set in their particular forms by the fact of political power in Tutsi hands, which is to say that there was no political problem as such for Rwanda as a whole, but a political condition that determined the contents, the form, the degree of severity or solubility of problems, and their ordinal place in solution priorities. Tutsi political power, which was redundantly organised and ruthlessly enforced, determined that the problems of living, for all Rwandans, be considered first of all in Tutsi terms, and solved first of all for the Tutsi through their capacity to command not only their own activities but also those of others and, most particularly, the Hutu majority of the population. The enforced priority of Tutsi solutions to Tutsi problems gave positive support in its turn to Tutsi political power by feeding its material, organisational and motivational resources. To illustrate: Tutsi political power operated through multiple lines of command in which

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[139]Vanhove, Essaie de droit coutumier du Rwanda, at 67.

[140]Vansina, L'Evolution du Royaume Rwanda, at 89; Pagès, Un royaume hamite au centre de l'Afrique, at 140; de Lacger, Le Rwanda ancien et le Rwanda moderne, at 73; Kagame, La poésie pastorale au Rwanda, at 400; and *Maquet*, Le Système des relations sociales dans le Rwanda ancien, at 105,106.

[141]Lema, A., Africa divided - The creation of "ethnic groups", Lund: Lund University Press, 1993.

[142]Codere, H., Power in Ruanda, *in: Anthropologica*, 1962, p. 51-52.

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inferiors obeyed orders out of fear of punishment and hopes ranging from those of minimal to those of great rewards; this required wealth far beyond Tutsi subsistence needs for redistribution to obedient underlings; this wealth was gained primarily from the command of Hutu services and a proportion of the goods produced by Hutus who thereby had less time for production on their own behalf and less enjoyment of their own production; the problem of the Tutsi need for wealth being solved, the wealth acquired maintained the power that came from the ability to command others to punish the disloyal or disobedient, and to obey out of fear and out of hoped-for material rewards.

As far as Tutsi hegemony was concerned, the system of power was watertight, guaranteeing Tutsi superiority and Hutu inferiority.

1.2.6.2 The concept of unlimited hierarchy in the society

Superiority and inferiority were *foci* of the Rwandan social structure to such an extent that, as soon as they entered as a component in the content of social intercourse, other components were regarded as less important and were coloured by the hierarchical situation of the two actors. "In western culture, relationships of inferiority are defined not only as regards the people taking part in them but also as regards the matters concerned."[143] A business executive may give orders to one of his employees only within very well-defined limits of competence and time, but he cannot oblige him to accept his views on, for instance, artistic or political questions. In Rwanda, on the contrary, when one of the persons involved in a dyad was superior to the other from a certain point of view, the superiority was diffused, as it were, through the whole relationship. For his subject, a chief was chief in whatever matter. As a consequence, inequality was conceived as essential. When two persons are considered unequal by nature, the superiority of one over the other cannot be limited to a certain sphere. We see in this ideology the tendency of Tutsis to behave as superiors and masters and Hutus to adopt an inferior position. Since conceptions about inequality seemed to be socially accepted, those who occupied the superior positions in most of the social relations in which they were involved tended to develop permanent authoritarian behaviour. This is characterised by what *Russell* calls "a propensity to command, to be self-assertive, arrogant, protective, and compassionate". Chiefs, rulers, and other superiors try to extend not only the size or range of their power (the number of people controlled) but its density (the degree of control of the subordinates).[144] Any independence manifested by the inferior will be resented as rebellious. The superior's opinions should never be opposed by the inferior who is always and everywhere expected to manifest his

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[143]*Maquet*, Le Système des relations sociales dans le Rwanda ancien, at 166.

[144]See Russell, B., Power, London, 1938, p.165.

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dependence by attitudes of compliance. Furthermore, there was no private sector in the life of the inferior vis-à-vis his superior. The superior has the right to control the whole of his subordinate's activities. This is not resented by the inferior as unbearable meddling. On the contrary, it is expected by the inferior who feels that such interference is a proof of the interest his superior extends to him. If a subordinate were to refuse his superior's interference on the grounds that he should not be concerned with his private affairs, such a pretension would be regarded as, at least, a definite lack of respect even in case the superior is *mala fide*.[145] The author agrees with *Maquet* when he compares this situation to that between a father and his little son where "there is no field in which a father could be wrong and his son right".[146] Indeed, obedience in everything must be required but one has every reason to assume that this could prevail as long as the little son remains little, that is, as long as Rwanda remains completely traditional without any possible influence capable of opening the minds of Rwandan people to other ways of socio-political life.

To sum up, Rwandan nation- and state-building started and developed through a caste system in which the components of the Rwandan society were organised into an immutable hierarchy, each of them being predominantly endogamous, having specific traditional occupations and being almost exclusively composed of individuals born from parents belonging to the group themselves. Tutsi pastoralists, although a minority, held all political power, controlled most sources of wealth, and exploited their agriculturist Hutu and Twa subjects who were receivers of orders and norms, not norm-makers. Despite the imbalance in numbers and the evident inequality in the society, social and political cohesion was assured through value consensus cattle clientship and a complex system of administrative arrangements. The most striking of these mechanisms has been the consensus that all Rwandans are not by birth fundamentally equal. Such value consensus implied an acceptance on the part of the dominated that some (Tutsis) are born to rule and exploit, while others are born to obey and serve. Projected to the epoch of the Universal Declaration of Human Rights (1948) and related instruments (1966), this situation suggests that the Rwandan society as it is organised in this section is not in the least able to accommodate the principle of equality without discrimination. Unless fundamental changes are made to the socio-political order, the reception of democratic principles itself is not likely to succeed, mostly because of the rigidity of the system. In this regard, it is important to analyse the colonial impact, since it is during colonial rule that important changes occurred.

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[145]Ibid.

[146]*Maquet*, Le Système des relations sociales dans le Rwanda ancien, at 166.

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1.3 Human rights during colonial rule

In this section, the author analyses the continuation of nation- and state-building and the state of human rights during the period of colonial rule in Rwanda. It is important to examine that period because the colonial experience has had a profound impact on the failure of the State and the manner in and extent to which human rights were respected in the post-independence period. The author argues that part of the absolutism and abuse of basic human rights that have characterised the post-independence era are legacies of colonial rule but it is also necessary to realise how the colonialists built upon and extended the ethnically based system of domination that was in place prior to their arrival.

A brief account follows of how the territory was colonised and administered by Belgium and the influence of the Catholic Church, as well as the state of human rights during that period is examined here in order to show how colonial rule was influenced by the preconception of inequalities between Hutus and Tutsis and was not carried out in the interests of Rwandans. The author will also consider the factors that led to the incorporation of a bill of rights in the self-government constitution of 1962, in order to show the influence of colonial rule on the conception of post-colonial rule which, as argued in Chapter two, failed to promote and protect human rights.

1.3.1 German occupation and rule

The first European to come into the territory was the German *Count von Götzen* who traversed the country in 1892.[147] He was followed by a small contingent of German officers with African soldiers who arrived in 1894, to set up a camp in *Kinyaga*, "the first region of Rwanda to experience European occupation".[148] Initially, Rwandan authorities attempted to resist by force of arms. When this failed, they later collaborated with the German authorities who established a military post in *Shangi* and colonial rule in the country from 1898. The Residence of Rwanda in Kigali, of which *Dr. Richard Kandt* had been the first incumbent, was created only in 1907. The military posts, which later became the *Regierungssitze,* had been established in *Kigali* (centre), *Cyangugu* (west) and *Gisenyi* (north-west). The colonial apparatus that emerged involved the interaction of two complementary systems of power. Through superior force, prestige, and wealth, the colonial authorities persuaded and often coerced the Tutsi elite to serve as intermediaries for the colonial administration, thus

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[147]For details about the arrival of Europeans in Rwanda, see Kandt, R., Caput Nili, Berlin, 1921; Vansina, L'Evolution du Royaume Rwanda, 7; Louis, R.W., Ruanda-Urundi 1884-1919, Oxford: Clarendon Press, 1963.

[148] Newbury, C., The cohesion of oppression, at 53.

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establishing a form of indirect rule. However, Germany applied a system of indirect administration of its own creation and not copied from the systems applied by other colonial powers[149], since the central idea was not to intervene fundamentally in the organisation of the social and political institutions of Rwanda. Besides, it would have been difficult to do much more than to protect the Rwandan king *Yuhi Musinga* and his indigenous organisation, since Germany had only five civilian authorities for the whole of Rwanda.[150]

Never, in reality, comprising more than a handful of soldiers and administrators, German rule did not change the nature of the Rwandan State; it remained the coercive instrument of Tutsi rule as described in the preceding section. In 1914, there were just six German civil servants in Burundi, and five in Rwanda, making a total of eleven officials for a territory twice the size of Belgium. Having discovered that the existing *Mwami* kingdoms already functioned as fully-fledged nations before the arrival of the Europeans and also, undoubtedly, because of a shortage of colonial personnel, the Germans decided from the very beginning to favour the policy of indirect rule. "This meant that full use was to be made of the existing political system".[151] The occupation came about through protectorate "treaties" negotiated between the Germans and the king.[152] The 1898 occupation began with the establishment of a military post at *Shangi*, and the Germans pursued an administrative policy of indirect rule, not only because the centralised political system was admirably suited to it, but because they realised that any attempt to displace king *Musinga* would probably have met with considerable resistance from the local population. Moreover, a new government would have required far greater numbers of European administrators than were available at the time, whereas studies show that, of all colonial administrations, Germany's was among the most understaffed. "As late as 1913 the whole of German East-Africa was administered by only seventy European officials".[153] In the process, the Tutsi aristocracy was viewed with considerable sympathy by the German officers on the spot, many of whom, according to *Linden*, were Prussian noblemen[154], thus favouring ethnic discrimination in the management of public affairs.

Since the Germans had earned *Musinga*'s trust and loyalty, they made every effort to strengthen and consolidate the position of the crown. *Musinga* used German forces to extend Tutsi hegemony to the

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[149]Louis, Ruanda-Urundi, at 200; Reyntjens, Pouvoir et droit au Rwanda, at 38.

[150] Id., at 204.

[151] Louis, Ruanda-Urundi, at 200.

[152] Reyntjens, L'Afrique des Grands Lacs en Crises, 1994.

[153] Louis, Ruanda-Urundi, at 201.

[154] Linden, I., Church and revolution in Rwanda, Manchester: Manchester University Press, 1977, p. 11.

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north. For example, *Lieutenant Eberhard Godowins* was enlisted to lead a punitive expedition against northern opponents in 1912. The northerners were brought into the kingdom and *Musinga* gave the Germans his loyalty in return for their assistance and support. The punitive expeditions served also to reinforce the absolutism of the monarchy, and consequently the hegemony of the ruling caste. Little was accomplished, however, in the realm of civil administration, because the entire period of German rule was largely devoted to those punitive expeditions. It has been reported that the administrative machinery set up by the Germans did not amount to more than a few strategically located police posts.[155]

However, Germans had pacified Rwanda, opened the country to trade, methodically explored the region, favoured the establishment of religious missions as centres of sanitary, economic, social and civilising development; they had effectively abolished slavery, put the *rupee* into circulation and introduced a poll tax. Particularly, they introduced coffee, tobacco, and rice cultivation as commercial crops, which they believed would provide revenues that would enable Africans to pay taxes. Central to the German economic development programme was colonisation and modern transportation, especially the railway. "The Germans believed that the railway would bring trade, trade would produce money, and money would enable Rwandans to pay taxes".[156] Rail transportation would also reduce costs of exports from Rwanda. While the Germans planned for the economic future of the country, they failed entirely in economic development, primarily because the war intervened before development plans could be fully implemented. Finally there were too few competent people to initiate development plans, and the Administration could not depend upon *Musinga* to control his subjects, since "his power declined in direct proportion to the distance away from his capital at *Nyanza*. Rebel chiefs could easily incite the latent hostility of the Hutu against the Tutsi". But these were moot concerns because Rwanda fell during April and May 1916, as the German forces withdrew before the concerted attack of superior Belgian and British forces. With the German defeat went the imperial vision and hope for a railway.[157]

1.3.2 Belgian occupation

In accordance with the Berlin Agreement of 1885 proclaiming the neutrality of the independent State of Congo, which had, since then, become *Congo Belge*, and German colonies, the Belgian government had, after the invasion of metropolitan Belgium by Germany, instructed the governor

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[155] Louis, Ruanda-Urundi, 131.

[156] Reyntjens, Pouvoir et droit au Rwanda, at 133.

[157] Ibid.

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general to adopt a defensive attitude.[158] Hostilities in Europe, however, had aroused new colonial ambitions in Germany, where the possibility was seen of realising the dream of a big empire in Central Africa.[159] However, these ambitions were disproportionate to the military possibilities of Germany who, especially in East Africa, could, at most, lead a campaign, since its troops comprised only 24 officers and non-commissioned officers and 152 *askaris* (indigenous soldiers under colonial troops).[160] In the process, Belgian troops, backed by British logistics, progressed rapidly and captured *Kigali* on May 11, *Nyanza* on May 23, *Bujumbura* on June 6, and *Tabora* on September 19, 1916. In this regard, Belgian troops occupied a vast territory of about 200,000 square kilometres from *Lakes Kivu* and *Tanganyika* to *Lake Victoria* and from northern volcanoes in Rwanda to *Tabora* along the *Dar-Es-Salaam - Kigoma* railway.

One problem to be solved apparently was how to manage the administration of these territories. But it should be noted that Belgium had clearly indicated their intentions since before the offensive: they were not interested in an occupation of German East Africa as such, but wanted to use it as a guarantee for a share they wanted to negotiate during the peace talks that were going to start after the victory of the allied forces.[161] In fact, the establishment of military rule through Ruanda-Urundi in 1916 was not only a normal epilogue to Belgium's victories in East Africa, but a necessary condition for the realisation of its ultimate political objectives. "One of the of our military effort in Africa", said the Belgian Minister of Colonies, *Jules Renkin*, in 1916, "is to assure possession of German territory for use as a pawn in negotiations. If, when the peace negotiations open, changes in possession of African territories are envisaged, the retention of this pawn would be favourable to Belgian interests from every point of view".[162] Thus, Belgium agreed with the British government, their territorial competitor, to consider this occupation as provisional and temporary and to wait until the end of hostilities for a final settlement, whence occupation and administration of German East African

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[158] De Lacger, L., Ruanda, Gitarama: Kabgayi, 1961, p. 447.

[159] See Louwers, O., Le Congo Belge et le pangermanisme colonial, Paris: Emile Larose, 1918.

[160] Louis, Ruanda-Urundi, at 210-211.

[161] This policy was clearly expressed in a long letter dated March 27, 1916 addressed by the Minister of Colonies, *J. Renkin* to the superior commandant of Belgian troops in the east, *General Tombeur*. *Renkin* wanted the retention of that guarantee to be to the advantage of Belgian interests, if, at the moment when peace talks opened, modifications to the then territorial status were envisaged. He stressed the necessity of occupation of conquered territories by Belgium to the exclusion of any foreign authority and wanted these territories to be as extensive as possible. He contended that it would be of the highest interest that their occupation attain, at least in one point, the western shore of *Lake Victoria*, which would, thus, present a very particular value in terms of size. He underlined the evidence that it would not be necessary to increase the occupation centres to justify their claim, but that they just had to retain, in each region, either the administrative centre that the enemy possessed there, or the most important strategic point. Archives Africaines, AE/II No 1844 (3287).

[162] Louis, Ruanda-Urundi, at 216.

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territories were precarious.[163] It should also be noted that prior to the Peace Conference, the Belgians had cast aside four territorial concessions from Portugal, on the southern bank of the Congo River, in exchange for the territory they had conquered during the East African campaign.

Besides, the margin of initiative left to the occupant by international law, particularly *The Hague* conventions, was not large. The provisions of section III of the annex to the 4th *Hague* Convention,[164] ratified by Belgium, were dominated by the principle that, if the occupant could assure their own security, they had also to attend to the interests of subjugated populations. Article 43 of that convention provided that the occupant "will take all requisite measures depending on him to restore and assure, as much as possible, order and public life, respecting the laws in force in the country, except where it was absolutely impossible". Some other limits were added to those of international law, particularly "those of discretion and moderation". Minister *Renkin* explained that, since their occupation was not definitive, they did not have to stop *hic et nunc* the regime that would most assure the the progress of those regions. He explained that they had to confine themselves to providing for momentary interests and to dealing with urgent situations, and that their activities in their new colony should not be intense. He stressed that, until a decision on its fate was made, they could let the colony lie dormant.[165] The same principles required that the colonial administration and the administration of the occupied territories be distinct and separated. The administration was thus assumed by the metropolitan power directly through the Governor General of *Congo Belge*. Minister *Renkin* specified that the Governor General acted ... as royal delegate, as the king was the chief of the Belgian Government and that the conquest was accomplished in his name. The Governor General was therefore subjected to the orders and authority of the Government.[166]

Administrative measures taken at the beginning of the occupation conform to the precarious status of occupied territories. This is illustrated by Article 9 of the *ordonnance-loi No 2/5 of April 6, 1917* which provided that in matters where the decrees of the royal commissioner did not provide for the powers and attributions of the employees and junior officers in the administration of occupied territories, the latter would conform to the rules and traditions established by the German

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[163] Murego, La Révolution Rwandaise, at 350; Reyntjens, Pouvoir et droit au Rwanda, 36.

[164] Act of the 2nd Hague Conference of October 18, 1907, 4th Convention on Laws and Customs of War, *in K. Strupp, Documents pour servir à l'histoire du droit des gens, Berlin: Hermann Sack, 1923, t11, p.687.*

[165] Letter dated October 1916 from Minister Renkin to General Tombeur, quoted in Reyntjens, Pouvoir et droit au Rwanda, at 64.

[166] Undated note (to be sent towards the end of 1916) from Minister Renkin to the governor general of Congo Belge and the royal commissioner of occupied territories, Archives Africaines, AE/II No 1844 (287), reproduced in Reyntjens, Pouvoir et droit au Rwanda, at 36-38.

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administration.[167] The first years of the occupation were marked by the influence of the Germans - for example the reliance on Tutsi traditional rulers to establish control under difficult conditions with a minimum of administrative personnel.[168] The preamble of statutory order no. 2/5 of 1917 stated that "for the interest of a good administration, it is advisable to respect, within the realms of possibility, the state of affairs existing before the Belgian occupation".[169] Belgian representatives were inspired, "in conformity with international law and depending on circumstances, by the line of conduct followed earlier by the German authority".[170] Besides, the German substantive law remained widely applicable. When it was a matter of infractions of common law, the court-martial applied the penal law of the colony to the employees of the occupation corps, and the provisions of German law to European nationals of occupied territories. The courts, magistrates' courts and *"police"* courts applied the provisions of German legislation in force in East Africa to the offenders, but they were also allowed to consider the *Congo Belge* penal law as a guide in accordance with the latitude left by the German colonial law for courts to depart from the provisions of law, or to extend them to cases not provided for, in order to adapt criminal justice to local necessities, when it was a matter of infractions perpetrated by indigenous people.[171] Similarly, in civil matters, the German law most often remained in use. Thus, as an example, the *ordonnance-loi No. 13/59 of March 11, 1919* for unifying the provisions relative to succession rights and to the settlement of successions[172], provided in Article 1 that the provisions of the decree of the Imperial Governor on November 4, 1893 would be applied, either to the successions of European nationals of occupied territories, or to those of the indigenous people.[173] One has every right to wonder how competent Belgian officers and employees were in Congolese or Belgian legal matters, since they were not jurists and their knowledge of the German

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[167] Article 9 reads: *"Dans les matières où les Ordonnances du commissaire royal ne déterminent pas leurs pouvoirs et attributions, les fonctionnaires et officiers préposés à l'administration des territoires occupés se conformeront aux règles et aux traditions établies par l'administration allemande". B.O.R.U., 1924, No. 4, suppl., p. 4-5.*

[168] The German attitude is presented succinctly in this statement by the Duke of Mecklenburg: "The fundamental principle is the same with all Residents. It is designed to strengthen and enrich the sultan and persons in authority, and to increase thereby their interest in the continuance of German rule, so that the desire for revolt shall die away, as the consequences of a rebellion would be a dwindling of their revenues. At the same time, by steadily controlling and directing the sultan and using his powers, civilising influences would be introduced. Thus, by degrees, and almost imperceptibly to the people and to the sultan himself, he eventually would be nothing less than the executive instrument of the Resident". Duke of Mecklenburg, In the Heart of Africa, 1910, cited in Louis, Ruanda-Urundi, at 145.

[169] Reproduced in Reyntjens, Pouvoir et droit au Rwanda, at 37.

[170] Report on the Belgian administration of occupied territories of German East-Africa, especially Ruanda-Urundi in 1920 and 1921, presented to the Chambers by the Honourable Minister of Colonies, Brussels, 1921, p. 7.

[171] Id., at 14.

[172] B.O.R.U., 1924, No. 4, suppl., p. 13.

[173] Reyntjens, Pouvoir et droit au Rwanda, at 38.

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legal system was not so great.[174] Although the case law is silent in this regard, one can conclude that Belgium started the organisation of Rwanda with a precarious position.

The political and administrative organisation that Belgian occupants found in Rwanda was rudimentary and everything was to be done since *Ruanda-Urundi* had scarcely managed to be the subject of a methodical administrative action, because of its eccentricity, and the Belgian government therefore had to plough a virgin soil.[175] The charge of occupied territories was entrusted to a royal high commissioner appointed by the Belgian king, with residence first in *Kigoma* and then in *Bujumbura.* He was directly linked to the Minister of Colonies in *Brussels* and was not answerable to the Governor General of *Congo-Belge* in *Boma.* The first *commissaire royal* was *General J.P. Malfeyt*, while the residence of *Ruanda*, with headquarters in *Kigali*, was entrusted to *Major J.F. De Clerck.*[176] For the purpose of resupplying the troops, Rwanda had been subdivided into two zones during the military campaign: the western zone with *Gisenyi* as headquarters, and eastern zone with *Kigali* as headquarters. Even after the troops had progressed over *Tabora* the Kingdom maintained that division into two zones, each subjected to the political direction of a chief of zone. The lack of co-ordination of the action of the chiefs of zone with that of King *Musinga* implied a long-term risk of political division in the kingdom.[177] In fact, the king's authority showed the effects of that measure aggravated again by military requisitions and at the beginning of 1917 most of Tutsi chiefs demonstrated the vague desire for independence, which menaced *Ruanda* into total anarchy.[178] As a consequence, by his *ordonnance No 2/5 of April 6, 1917* the *commissaire royal* re-established the former German territorial organisation and restored the unity of direction of Musinga kingdom.

The residence of *Ruanda*, created in May 1917 was divided into three areas during the same year,[179] and from 1921 in four territories: the west territory with headquarters in *Rubengera*; the north territory with headquarters in *Ruhengeri*; the *Nyanza* territory with headquarters in *Nyanza*; and the east territory with headquarters in *Kigali.*[180] Initially, the administrative responsibility was entrusted to

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[174] Ibid.

[175] Marzorati, A. S., Governor of Ruanda-Urundi, before the permanent commission of mandates: report of the sixteenth session, November 6-26, 1929, p. 56; Reyntjens, Pouvoir et droit au Rwanda, at 38; Louis, Ruanda-Urundi, at 200.

[176] Major De Clerck arrived in Kigali on April 30, 1917. Since May 17, 1916, Captain Scharfes had acted as resident, but his duties had been mainly military. Archives des Pères Blancs, Rome.

[177] Malfeyt, J.P (*commissaire royal*), Note on the political report of Ruanda, Kigoma, January 3, 1919, *in Archives Africaines* AE/II No 1847(3288).

[178] Rapport 1921, p. 11.

[179] Summary of the situation in East Africa, p. 9 *in Archives Africaines, AE/II No. 1847 (3288); Report 1920-21).*

[180] Eede, V.D., Note on the current political situation in Rwanda, Brussels, July 26, 1621 *in Archives Africaines, AE/II No. 1847 (3288).*

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servicemen and it took some years for Rwanda to have full administration. The initial concern was to provide for peace and public order and this was done by maintaining the existing balance among indigenous groupings.[181] The return to civil administration was delayed until the beginning of 1919, mostly because the state of war persisting in German East Africa had obliged the Belgian high command to take military measures, such as requisition of food and levy of porters. Moreover, the occupying government had to assure the transport of troops and ammunitions through conquered territories and to provide for their re-supplying. It is in May 1919 that *Major De Clerk* handed over power to the first civil resident, *E. Van Den Eede*.[182]

By Article 119 of the Treaty of Versailles signed on June 28, 1919, Germany renounced all rights over its overseas possessions, including German East Africa, in favour of the "principal Allied and Associated Powers" (United Kingdom, France, Italy, Japan), the contracting parties to the Treaty. The United States had not ratified the Treaty and was not in that group. As Belgium was not a principal power, it was excluded from the first sharing out of German colonies decided on May 6, 1919 by the supreme council of Allied and Associated Powers.[183] It was decided that Great Britain would receive the mandate over the whole of German East Africa. Belgium protested vigorously to the Council of the four powers and started negotiations with the British government, which resulted in the *Orts-Milner* Agreement signed on May 30, 1919, before the Treaty of Versailles.[184] According to this agreement, Belgium and Great Britain committed themselves to request the supreme council to grant Belgium the right to administer Rwanda and Burundi, and Great Britain to administer its lion's share, the rest of the former German territory. The supreme council accepted this proposal on August 21, 1919.[185] Although Belgium had to give up three-quarters of the territories it occupied, it pulled through honourably, since, at the beginning, it was to be excluded from the partition. On the other hand, however, the acquisition of *Ruanda-Urundi* was, to use Louis' words, "one of the biggest ironies of African colonial history".[186] The Belgian hope to acquire the southern bank of the Congo River failed and Belgium kept *Ruanda-Urundi*, a territory which apparently did not interest it.[187] "Belgian statesmen thought it rather meagre compensation for their contribution to the war effort".[188]

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[181] Rapport 1920-1921, p. 7.

[182] Id., at 8.

[183] Heyse, T., Le mandat Belge sur le Ruanda-Urundi, Brussels: La Renaissance de l'Occident, 1930, p. 5.

[184] For details about those negotiations, see Louis, Ruanda-Urundi, at 238-51.

[185] Ibid.

[186] Louis, Ruanda-Urundi, at 255.

[187] Reyntjens, Pouvoir et droit au Rwanda, at 42.

[188] Lemarchand, Rwanda and Burundi, at 63.

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Whether they would be committed to the establishment of democratic values for a post-colonial Rwanda is a matter to be considered in the next subsection.

1.3.3 Belgian administration

Rwanda's colonial period encompassed the reigns of three African rulers - *Yuhi Musinga* (1896-1931), *Mutara Rudahigwa* (1931-1959) and *Kigeri Ndahindurwa* (1959-1962) - and the colonial rule of Germany (1898-1916) and Belgium (1916-1962).[189] The main characteristic of this administration was the reliance on Tutsi superiority over Hutus by both the Catholic Church and the administration and failure by the colonists to prepare Rwandans for their self-administration and the observance of their rights.

1.3.3.1 The colonial mandates

The colonial mandates system was established in Versailles by the members of the League of Nations. The covenant of the League of Nations (Treaty of Versailles), which in 1920 established the League and served as its Constitution, provided that the tutelage of the peoples inhabiting these colonies - "peoples not yet able to stand by themselves under the strenuous conditions of the modern world" - should be entrusted to advanced nations who were willing and able to undertake this responsibility, to be exercised by them as mandatory on behalf of the League of Nations. The covenant contained no general provisions dealing with human rights. The notion that human rights should be internationally protected had not yet gained acceptance from the community of nations, nor was it seriously contemplated by those who drafted that treaty. The covenant did, however, contain two provisions (Articles 22 and 23) that bear on the development of international human rights law. The League also played an important role in helping with the implementation of post-World War I treaties for the protection of minorities. The system was based on three principles stated in the preamble and in Article 22 of the Treaty: that the system applies to countries inhabited by peoples who are considered still incapable to govern themselves and enforce the observance of their rights; that the tutelage of those peoples is entrusted to advanced nations that, by reason of their resources, their position, can best undertake this responsibility as mandatory on behalf of the League of Nations; and that the well-being and the development of those peoples form "a sacred trust of civilisation" of which it is important to assure some guarantees.[190]

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[189] Linden, Church and revolution in Rwanda, at 1-5.

[190] Orts, P., Le Système des mandats de la Société des Nations, in: Revue de l' Université de Bruxelles, 1926-27, p. 506-507.

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The Covenant made provision for three types of mandate according to the stage of development, the geographical location of the territory, its economic conditions, and other similar circumstances. Those three types, according to Article 22 of the Covenant, are defined as follows:[191]

Mandate A: Applied to communities formerly belonging to the Turkish Empire (Mesopotamia, Syria, Palestine). These communities "have reached a stage of development where their existence as independent nations can be provisionally recognised subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone".

Mandate B: Especially for African communities (Cameroon, Togo, German East Africa), the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience or religion, subject only to the maintenance of public order and morals, the prohibition of abuses, such as the slave trade, the arms traffic, and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

Mandate C: For territories such as South West Africa and certain of the South Pacific Islands which, owing to the sparseness of their population, or their small size, or their remoteness from the centres of civilisation, or their geographical contiguity to the territory of the Mandatory, and other circumstances, can be best administered under the laws of the Mandatory as integral portions of its territory, subject to the above-mentioned safeguards in the interests of the indigenous population.

The mandate on *Rwanda-Urundi*, as Rwanda and Burundi formed one territory, was a mandate of type B and was entrusted to Belgium by the "Principal Powers". This decision was confirmed on July 22, 1922 by the Council of the League of Nations that had to define it on August 31, 1923. By the Act of October 20, 1924[192], Belgium agreed with the League to administer these territories pursuant to "the principle that the well-being and development of peoples form a sacred trust of civilisation ...". It also undertook to provide the League with annual reports bearing on the discharge of its responsibilities. These reports were to be reviewed by the Mandates Commission of the League.

The Mandates Commission gradually acquired more power in supervising the administration of the Mandates and the manner in which the native populations were treated.[193] The dissolution of the

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[191]Secretariat of the League of Nations, The League of Nations and the Mandates, Geneva, 1924.

[192]B. O. R. U., 1925, No. 1, p. 1.

[193]Sohn, L. & Buergenthal, T., International Protection of Human Rights, 1973, p. 337-373.

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League ended this development. In its stead, the United Nations established the UN Trusteeship System, which was entrusted with supervisory power over the remaining Mandates and other non-self-governing territories. *Ruanda-Urundi* was put under that system in 1946.

Article 23 of the League of Nations Covenant concerned human rights in that it dealt, *inter alia*, with questions relating to the "fair and humane conditions of labour for men, women, and children." It also envisaged the establishment of international organisations to promote this objective. That function was assumed by the International Labour Organisation, which came into being at about the same time as the League. The ILO survived the League and is now one of the Specialised Agencies of the United Nations. The legislative activities and the supervisory machinery established by the ILO to promote and monitor compliance with international labour standards have over the years made important contributions to the improvement of the conditions of work and the development of international human rights law.[194]

Although the author will not extend his comments to the European economic exploitation of Africa through colonisation he supports *Van Maanen-Hemer*'s observation that Africa and the Pacific Islands have had no independent history, for their affairs have been so closely linked with European developments as to be rather a manifestation of the latter than imbued with an integral character of their own. Indeed, "their territory has been transferred as the result of wars and transactions in Europe; the slave trade and slavery have been checked as the result of anti-slavery agitation in Europe; their commercial development was started to supply raw materials and markets to Europe; protecting and civilising of their native inhabitants have been undertaken as the result of enlightened sentiment in Europe".[195] The author says this to prove that it is to Europe rather than to Africa that one must look for the causes which led to the establishment of the mandate system. Perhaps the main factors in the history of the past hundred and fifty years, as observed by *Van Maanen-Helmer*, have been the development of industrialism and the development of individualism.[196] As a result of the Industrial Revolution the individual has tended to become a unit merely in the great economic machine of production, distribution and consumption; as a result of the French Revolution, he has

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[194]See Jenks, C.W., Human rights and international labour standards, 1960; Landy, E.A., The effectiveness of international supervision: Thirty Years of ILO experience, 1966.

[195]Van Maanen-Helmer, E., The Mandates system in relation to Africa and the Pacific Islands, London: P. S. King & Sons, 1929, p. 1.

[196]Ibid.

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tended to realise that he is more than a mere unit in anything, i.e. that he is an individual with at least a right to life, liberty and the pursuit of happiness.[197]

These two factors have a direct effect on the relations between "advanced and backward peoples". On one hand, in commercial exploitation, the "backward peoples" have been regarded simply as agents in the production and consumption of articles of commerce. On the other hand, in the movement for the protection of the natives, they have been regarded as entitled to the rights of human beings.

In the realm of practical politics, the commercial point of view, being strongly backed, was too often allowed to dominate. The power of commercial companies, and the fact that members of their boards in many cases were officials in Colonial Offices, either simultaneously or subsequently, together with the fact that the company often carried on the government in the early days of a colony[198], led the general way to the identification of their interests with colonial policy. In the background, however, there always was a strong humanitarianism, so characteristic of the nineteenth century, working vigorously for the welfare of weaker peoples and from time to time making itself felt in Government policy. Adherents of both movements united in realising, nevertheless, that the commercial exploitation of "backward" territories without the protection of their inhabitants would be unwise, while the protection of the inhabitants without any parallel programme of commercial development would be impossible.[199] The writer will focus later on the extent to which the colonisers fulfilled their obligations with regard to promoting and protecting human rights and the rule of law in Rwanda.

1.3.3.2 The Tutsi superiority theory

> The *Mututsi* of good race reveals nothing of the Negro, apart from his colour. He is usually very tall, 1.80m at least, often 1.90m or more. He is very thin, a characteristic which tends to be even more noticeable as he gets older. His features are very fine: a high brow, thin nose and fine lips framing beautiful shining teeth. *Batutsi* women are usually lighter-skinned than their husbands, very slender and pretty in their youth, although they tend to thicken with age. ... Gifted with a vivacious intelligence, the Tutsi displays a refinement of feelings which is rare among primitive Hutu people. He is a natural-born leader, capable of extreme self-control and of calculated goodwill.[200]

The Europeans were quite smitten with the Tutsis, whom they saw as definitely too fine to be

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[197] Lemarchand, Rwanda and Burundi, 171.

[198] See The British South Africa Company and the Royal Niger Company.

[199] Van Maanen, The Mandates system in relation to Africa and the Pacific Islands, 1929; Paternostre de la Mairieu, 21.

[200] Ministères des Colonies, Rapport sur l'Administration belge du Ruanda-Urundi (1925), p. 34. *Quoted in Harroy, J.P., Le Rwanda, de la féodalité à la démocratie (1955-1962), Brussels: Hayex, 1984, p. 28.*

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"negroes". Since they were not only physically different from the Hutu[201], but also socially superior, the racially-obsessed nineteenth-century Europeans started building a variety of hazardous hypotheses on their "possible", "probable" or, as they soon became, "indubitable" origins. The man who started it all was *John Hanning Speke*, the famous *Nile* explorer.[202] He presented what he called his "theory of conquest of inferior by superior races". After observing the "foreign" origin of some ruling groups in several of the inter-lake kingdoms, he deduced from this fact a theory linking the monarchic institutions he had found in the area with the arrival of a "conquering superior race", carrier of a "superior civilisation". He decided without a shred of evidence, that these "carriers of a superior civilisation" who were the ancestors of the Tutsi were the *Galla* of southern Ethiopia,[203] a opinion later shared by other nineteenth-century explorers such as *Sir Samuel Baker* and *Gaetano Casati* and by twentieth-century missionaries such as *Father van den Burgt*, *Father Gorju* and *John Roscoe*.[204] *Father Pagès*, on the other hand, thought that they were descendants of the ancient Egyptians, while *De Lacger* saw them as coming from either Melanesia or Asia Minor. Some of the authors could become rhapsodic about their "superior race": "We can see Caucasian skulls and beautiful Greek profiles side by side with Semitic and even Jewish features, elegant golden-red beauties in the heart of Ruanda and Urundi".[205]

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[201] The description of the Hutu was not much more prepossessing: "The Bahutu display very typical Bantu features (...) They are generally short and thick-set with a big head, a jovial expression, a wide nose and enormous lips. They are extroverts who like to laugh and lead a simple life." *Ministère des Colonies, Rapport, quoted in Reyntjens,* Pouvoir et droit au Rwanda.

[202] Speke, J.H., "History of the Wahima", *Journal of the Discovery of the Source of the Nile, London, 1863.*

[203] They are called today by their real name, "Oromo". In Amharic "Galla" means "savages", hardly a term to call a "superior civilization" coming from the Abyssinian group traditionally linked with the monarchic institution. The Oromo were a nomadic Cushitic group which had persistently fought the Abyssinian kingdom(s) since the sixteenth century before being finally partially culturally assimilated and partially subjugated in the nineteenth century. *Prunier, The Rwanda Crisis, at 7.*

[204] Ibid.

[205] Father *van den Burgt*, Dictionnaire Français-Kirundi, p. 1, xxxv. Quoted in Mworoha, Peuples et Rois de l'Afrique des lacs, at 25. Le Roi adds that "The Bahima (a Tutsi clan) differ absolutely by the beauty of their features and their light color from the Bantu agriculturists of an inferior type. Tall and well-proportioned, they have long thin noses, a wide brow and fine lips. They say they came from the North. Their intelligent and delicate appearance, their love of money, their capacity to adapt to any situation seem to indicate a semitic origin." *Mgr Le Toy in Piollet, J.B., Les Missions catholiques françaises au XIXème siècle, Paris: Les Missions d'Afrique, 1902, p. 376-7. Note "love of money" as proof of Semitic origin!* Jamoulle adds that "they resemble the negro only in the colour of their skin" Jamoulle, M., "Notre mandat sur le Ruanda-Urundi", *in: Congo, 1927, p. 487; and according to de Lacger, "Avant d'être négritisés, ces hommes étaient bronzés";* ... . "His stature resembles more closely that of a white person rather than that of a negro - in fact, it would not be an exaggeration to state that he is a European who happens to have a black skin ... ." *De Lacger, Ruanda*, at 56; Gahama, J., Le Burundi sous administration Belge, Paris: CRA- Karthala- ACCT, 1983, p. 14; Adekanye, J.B., Rwanda/Burundi: "Uni-ethnic" dominance and the cycle of armed ethnic formations, Oslo: International Peace Research Institute, 1995, p. 11. Prunier finds that most respected anthropologists of the time such as *Ratzel, Paulitschke, Meinhof, Sergi* and *Seligman* competed with each other to give those "scientific" theories not only credence but also wide publicity." (*Prunier, The Rwanda Crisis, at 36).*

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"Everything of value in Africa had been introduced by the Hamites".[206] The Tutsi and related groups such as the *Masai* came from a "primordial red race". They had "an absolutely distinct origin from the negroes" which they considered as "belonging to an absolutely inferior order". They came from India - or even, as the Dominican *Father Etienne Brosse* suggested, from the Garden of Eden.[207] Some years later, the Belgian administrator Count *Renaud de Briey* coolly speculated that the Tutsi could very well be the last survivors of the lost continent of *Atlantis*.[208]

The importance of this type of consideration will be perceived in the following subsections where it will be shown how it conditioned the views and attitudes of the Europeans regarding the Rwandan social groups they were dealing with. It also became a kind of unquestioned scientific canon that governed the decisions taken by the colonial authorities. Furthermore, it had a massive impact on the natives themselves. Indeed, for Europeans, the attractiveness of this superiority hypothesis lay in the fact that it allowed linking physical characteristics with mental capacity: "*Hamites*" were supposed to be born leaders and, in principle, had the right to history and a future almost as noble as that of their European "cousins".[209] The result of the attribution of highly value-laden stereotypes for some sixty years would end by inflating the Tutsi cultural ego inordinately and crushing Hutu feelings until they coalesced in an aggressively resentful inferiority complex. If these subjective feelings are combined with the objective political and administrative decisions of the colonial authorities favouring one group over the other, the reader can begin to see how a very dangerous social bomb was almost absent-mindedly manufactured throughout the "peaceful" years of foreign domination.

1.3.3.3 The influence of the Catholic Church

The study of the role played by the Church as, in principle, a multi-class and multiracial institution and as a source of ideology is essential to explain the way the human rights conscience was acquired by Rwandan minds. The most important ingredient in this new philosophy was the *White Fathers* in the sense that they not only outlived two colonial regimes, but their presence had a far more immediate impact on the lives of individual Rwandans than the few colonial administrators.[210]

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[206] Sanders, EP, "The Hamitic Hypothesis: its origin and functions in time respective", *Journal of African History*, Vol. X, No. 4, p. 521.

[207] For a detailed study of the "scientific" literature of the Tutsi origin, see Chrétien, J.P., "Les deux visages de Cham" *in: Guiral P., and Témime, E., (eds), L'idée de race dans la pensée politique française contemporaine, Paris: CNRS, 1977, p. 171-99.*

[208] Comte Renaud de Briey, Le Sphinx noir, Brussels: Albert De Witt, 1926, p. 62.

[209] Linden, Church and revolution in Rwanda, at 2.

[210] Codere, H., The biography of an African society: Rwanda, 1900-60, Annales series *in 8, MRAC, Tervuren, No. 79, 1973.*

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Furthermore, the Catholic Church in Rwanda grew into a type of "First Estate" which both nobles and Belgians had to accommodate.[211] This can be explained by the fact that a necessary prerequisite for membership of the élite of the new Rwanda the Belgians were creating was to become a Christian. Many priests were delighted to see the country's élite suddenly flock to them rather than the social outcasts, their clientele. By 1930, *Father Soubielle* was writing of what he termed "a massive enrolment in the Catholic army": "Our *Batutsi* have finally made up their minds and, having done so, they have immediately taken the lead in the movement".[212] Some of the other Fathers were less enthusiastic about the motivations of their new converts, such as the anonymous writer of the *Zaza* Mission diary who wrote on 19 November 1931: "Their motives are perhaps not the most disinterested, but with the help of God's Grace, they will be turned into good Christians".[213] From that moment on, the Catholic Church became an important element in the Belgian reorganisation of Rwanda.[214]

But the Church had been in Rwanda since the beginning of the German occupation, and when the Belgians came they found the often francophone priests (mostly White Fathers) expert and highly knowledgeable about the country and thus a godsend. While the administrators came and went, the Fathers remained, staying on for their whole lives. They were almost the only whites to speak *Kinyarwanda* well, and the only ones, too, who wrote about "native customs". Some of them, such as *Father Pagès* or *Father Pauwels*, were considered as almost absolute authorities on matters Rwandan, and *Mgr Classe*, who had arrived in Rwanda as a simple priest in 1907 and became Vicar Apostolic in 1922 (he survived till 1945), almost was a national monument. Before 1927 the Church had lacked firm grounding in Rwandan social reality, but by 1932 it had become its main social institution, presiding over hundreds of thousands of converts, including the king himself.[215] The Church had an impact on many aspects of Rwandan society. First of all, it imparted a strong moralistic streak to the African way of life. Polygamy was evil and adultery was a sin, thrift and hard work were encouraged, and social displays of conventional piety were required from all. Rwandan society under the influence of the Church became, if not truly virtuous, then at least conventionally hypocritical. It will later be seen that this social hypocrisy would be carried over from the Belgian

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[211] See Linden, Church and revolution in Rwanda, at 2.

[212] Quoted in De Lacger, Ruanda, at 519-20.

[213] Quoted in Linden, Church and revolution in Rwanda, at 189.

[214] This is somewhat paradoxical since Belgian cabinets often contained strongly anti-clerical socialist ministers. See Kalibwami, J., Le catholicisme et la société rwandaise, Paris: Présence africaine, 1991; Des Forges, A., "Kings without crowns: The White Fathers in Ruanda" in MacCall, D.F., and Bennett, N. (eds), Eastern Africa History, New York: Praeger, 1969, p. 176-207.

[215] Prunier, The Rwanda Crisis, at 32.

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colonial microcosm into the new politically independent Rwandan Republic.

Meanwhile, an effect of the christianisation of Rwanda that is less often discussed was the quasi-disappearance of the *kubandwa*[216] possession cult and the changes it brought to the spiritual and cultural life of the country. *Kubandwa* had been an element of social cohesion because it was home-grown, trans-ethnic and highly personal. Christianity was also trans-ethnic, although definitely Tutsi-dominated during the colonial years, but it was foreign and rather abstract. As the reasons for converting to Christianity were fundamentally social and political, Christian values did not penetrate deeply, even if Christian prejudices and social attitudes were adopted as protective covering. Catholicism not only became linked with the highest echelons of the State but became completely enmeshed in Rwandan society from top to bottom. "It was a legitimising factor, a banner, a source of profit, a way of becoming educated, a club, a matrimonial agency and even at times a religion."[217] But since it was all things to all men, it could not have any real healing power when faced with the deepening ethnic gap which, as indicated in the next section, the Belgian authorities kept digging absent-mindedly. Christianity did not transcend social fractures, it reproduced them in many different dimensions and (albeit unwittingly) exaggerated their effects. According to *Berger*[218], "in Rwanda, as elsewhere, the themes of symbolic reversal and institutionalised disorder may serve to reinforce rather than to challenge the classificatory categories of society".[219] On the contrary, however, the moderate institutionalised Christian order, socially hegemonic but almost totally missing the internalised moral underpinning of Christian values, proved to be an element in the violent challenge of these same categories.

The Church also had a monopoly on education, which ensured fairly good quality teaching, but a limited spread of school education, since attendance was paid for and not compulsory. And since the Tutsis were the "natural-born chiefs" they had to be given priority in education, so that the Church could enhance its control over the future élite of the country. The particular position taken on the matter by *Monsignor Leon-Paul Classe*, the Vicar Apostolic to Rwanda was of considerable influence. In a letter dated September 21, 1927, he wrote to *Georges Mortehan*, the Belgian *Commissaire Résident,* explaining that, if Belgians wanted to be practical and look after the real interest of the country, they should find a remarkable element of progress in the Tutsi youths. He

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[216] Kubandwa cult is a personal cult, providing psychological safety valves for its adepts but with a limited or even non-existent social and political content when compared with Catholicism. *Ibid.*

[217] Id.

[218] Berger, I., Religion and Resistance: East African kingdoms in the pre-colonial period, Butare: INRS, 1981, p. 82.

[219] In its fight against "paganism" the Catholic Church also destroyed another social practice of great importance, the

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said that, being eager to learn, desirous to know what came from Europe, as well as to imitate Europeans, and enterprising, these youths were a force for the good and for the future of the economy. He contended that Hutus preferred not to be given orders by their own tribesmen whom they considered uncouth but rather by noble Tutsi because the latter were born chiefs and, thus, had a knack for giving orders. According to him this quality was the secret of how Tutsis had managed to settle in Rwanda and hold it in their grip.[220] Faced with what he saw as "hesitations and foot-dragging of the colonial administration regarding the traditional hegemony of well-born Tutsi", *Monsignor Classe* issued a stern warning in 1930, stating that the greatest mistake the government could make would be to suppress the Tutsi caste. He stressed that such suppression would spark a revolution and lead the country into anarchy and viciously anti-European communism, which was far from achieving progress.[221]

Effectively, the Vicar Apostolic's intervention put an end to the "hesitations and foot-dragging" of the administration and, together with the Church, gave preferential treatment to Tutsis when recruiting indigenous people for various jobs and places in education. Amongst other consequences, illiteracy rates remained high, alongside the promotion of good quality higher education.[222] To obtain any kind of post-secondary education, the Hutus had no choice but to become theology students at the

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practice of *kunywana*, the blood-pact ritual which could bind together people of different social origins.

[220] The letter reads: "Si nous voulons nous placer au point de vue pratique et chercher l'intérêt vrai du pays, nous avons dans la jeunesse mututsi un élément incomparable de progrès, que tous ceux qui connaissent le Rwanda ne peuvent sous-estimer. Avides de savoir, désireux de connaître ce qui vient d'Europe, ansi que d'imiter les Européens, entreprenants, se rendant suffisamment compte que les coutumes ancestrales n'ont plus de raison d'être, conservant néanmoins le sens politique des anciens et le doigté de leur race pour la conduite des hommes, ces jeunes gens sont une force pour le bien et l'avenir économique du pays. Qu'on demande aux bahutu s'ils préfèrent être commandés par des roturiers ou par des nobles, la réponse n'est pas douteuse; leur préférence va aux batutsi, et pour cause. Chefs nés, ceux-ci ont le sens du commandement ... . C'est le secret de leur installation dans le pays et de leur mainmise sur lui." De Lacger, Le Rwanda ancien et le Rwanda moderne, at 523.

[221] "... le plus grand tort que le gouvernement pourrait se faire à lui-même et au pays serait de supprimer la caste mututsi. Une révolution de ce genre conduira le pays tout droit à l'anarchie et au communisme haineusement antieuropéen. Loin de procurer le progrès, elle annihilera l'action du gouvernement, le privant d'auxiliaires nés capables de le comprendre et de le suivre ... . En règle générale, nous n'aurons pas de chefs meilleurs, plus intelligents, plus actifs, plus capables de comprendre le progrès et même plus acceptés du peuple, que les batutsi". Classe, L., Pour moderniser le Ruanda, *in L'Essor colonial et maritime, No. 489, December 4, 1930.*

[222] The possibilities of most Hutu were further limited by the discrimination introduced in the Catholic schools, which represented the dominant educational system throughout the colonial period. Tutsis who had resisted conversion became increasingly enrolled in the Catholic mission schools. To accommodate and further encourage this process, the Church adjusted its educational policies and openly favoured Tutsi and discriminated against Hutu. For example, in Astrida College, in 1932, Tutsi pupils were 45 and Hutu 9; in 1945; Tutsis were 46, while Hutus dropped to 3; in 1954 Tutsis were 63, while Hutus were 19 including 13 from Burundi. *Lemarchand, Rwanda and Burundi, Chapter 4.* In the late 1950's less than 30 percent of the children in primary school in Rwanda were Hutus; in secondary schools, less than 10 percent were Hutus. *United Nations, Trusteeship Council, Report of the U.N. Visiting Mission to the Trust Territories in East Africa, 21st Session, Supp. No. 3, T/1402 (September 18-October 10, 1957), par. 268.* Although the 10 percent figure does not take into account Hutu seminarians (who received education comparable to that of the regular secondary schools), still the proportion of educated Hutus did not approach the proportion of Hutus in the population. *Atterbury,* Revolution in Rwanda, *at 31.*

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Kabgayi and *Nyakibanda* seminaries. After graduation they tended to experience difficulties in finding employment corresponding to their level of education.[223] Moreover, the few Hutu chiefs and sub-chiefs in place were removed and replaced by Tutsis and a policy favouring protection and strengthening of the Tutsi hegemony was thus vigorously pursued. Therefore, and given that Hutus, and even Twas, had traditionally exercised some political power, albeit at lower levels, the *Tutsification* of the 1930s resulted in a monopoly of political administrative power in the hands of the Tutsis. It will be seen that, with the abolition of the threefold hierarchy of the chiefs (army chief, cattle chief and land chief) to be replaced by one single chief, this policy accentuated the ethnic divisions. It was also reinforced by the introduction of identity cards in 1933 according to which every Rwandan was thenceforth registered as Tutsi, Hutu *or* Twa.[224] This discriminatory treatment often embittered and frustrated Hutus, something that was to play an important role in the 1959 social upheaval. Alongside this discrimination, the fact that the Church was teaching that all men were equal before God was a revolutionary concept in a society with such a rigid class structure and this was going to be one of the most catalytic factors for the demands for "equality".

1.3.3.4 Belgian politics

When, in 1916, Belgium occupied *Rwanda-Urundi*, the two kingdoms of Rwanda and Burundi had only been marginally administered from *Berlin* (via *Dar-es-Salaam*) since 1899. Belgium adopted the policy of indirect rule that had existed elsewhere prior to colonisation in Africa. The Romans had applied it in their conquests and recently the British had utilised it in India, Egypt and Malaysia. Imposed, first, by colonisation constraints, particularly limited means of personnel and money for administration, the method of indirect rule became a theoretical concept of indigenous policy.[225] As defined by *Sir D. Cameron*, indirect rule is

> the principle ... of adapting for the purposes of local government the institutions which the native peoples have evolved for themselves, so that they may develop in a constitutional manner from their own past, guided and restrained by the traditions and sanctions which they have inherited (moulded or modified as they may be on the advice of British officers) and by the general advice and control of those officers.[226]

In practice, the representative power recognises indigenous political institutions that it assists in their

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[223] A number of them worked in the mines and industry. Newbury, C., The cohesion of oppression, at 181.

[224] Reyntjens, Pouvoir et droit au Rwanda, at 106.

[225] Lord, L., The Dual Mandate in British Tropical Africa, London: Frank Cass, 1965.

[226] Cameron, D., Principle of Native Administration and their application, Dar-es-Salaam: Government printer, 2nd ed., 1930, p. 6.

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adaptation to the functions of local government.[227] The *Ordonnance* of April 6, 1917 on the territorial and administrative organisation of the occupied territories stated that, under the authority of the Resident Commissioner, the sultans (kings) exercised their political and judicial powers to the extent that these were in accord with indigenous customs and the instructions of the Royal Commissioner. The *Loi of 21 August 1925* for regulating the government of Ruanda-Urundi entered into force on March 1, 1926 when Belgium legally put to end the occupational regime.[228]

The legal existence of indigenous areas and authorities was recognised by the *Ordonnance-Loi No. 347/A.I.M.O of October 4, 1943.* Articles 1 to 4 provided that the country was headed by a supreme chief appointed according to the custom under the name of *Mwami* (king), the *chefferie* headed by a chief and the *sous-chefferie* headed by a sub-chief. Article 5 granted juristic personality to the State and the *chefferie*. As for administration, Article 30 provided for these three organs to be administered according to custom, but subject to the provisions of the *Ordonnance-Loi* and to the fact that the customs could not be contrary to the rules of public law, the legislative provisions and the regulations.

It is noteworthy that customary authorities were those determined by custom, but here again, on condition that the representative authority explicitly gave its agreement. Thus, according to Article 31 of the *Ordonnance-Loi,* the *Mwami* was the indigenous person determined by custom as the most qualified to exercise this function after investiture by the governor. Likewise, Article 32 provided for the chiefs and sub-chiefs to be appointed by the *Mwami* according to the custom, but that the chief had to be appointed by the Governor and the sub-chief by the Resident. In case the chief or the sub-chief were dismissed and the *Mwami* did not appoint the successor within two months, the Governor appointed the chief and the Resident the sub-chief.

Some other provisions demonstrate the *"quasi-intégration"* of customary authorities into the framework of the political and administrative organisation of the colonial power[229]: Article 33 provided that the three authorities had to solemnly promise to conform to the instructions and legal orders of the colonial authority: the promise was given to the Governor by the *Mwami*, while the chief made it to the Governor or his representative, and the sub-chief to the Resident or his representative. In case of vacancy, Article 33 provided that the *Mwami*'s attributions were exercised *ad interim* by the Resident. According to Article 35, which provided for customary taxes due to the *Mwami*, chiefs and

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[227] Perham, M., Some Problems of Indirect Rule in Africa, *Journal of the African Society, 1936, p. 4.*

[228] Id.

[229] Reyntjens, Pouvoir et droit au Rwanda, at 44.

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sub-chiefs, these taxes were determined by the *Mwami,* after the governor's approval.

Regarding the indigenous political organisation itself, there had been no legal regulations but only administrative decisions, most often with an *ad hoc* character. It was not until 1943 that the *ordonnance législative no. 347/A.I.M.O of October 4, 1943* for the first time legalised the powers that the administrative authority had given itself, such as the power to fix and modify the limits of *chefferies* and *sous-chefferies*, to regulate the censuses and transfers, to forbid the settlement of indigenous people from certain regions, to conduct the investiture of kings, chiefs and sub-chiefs, to inflict disciplinary punishment to the same authorities, to determine the number of staff members, to give instructions related to the execution of forced labour, etc. As can be observed, this legislative order did not create anything new, it only recognised the existing structure and already established powers.[230]

1.3.3.4.1 The State apparatus

Belgian colonial territories could be termed Administrative States: the structure of the administrative hierarchy was, in effect, the Constitution.[231] But the political organisation under no colonial system in Africa was based on such principles of constitutionalism as the separation of the branches of government or checks and balances. The fundamental law governing the Belgian Congo from 1908, and *Ruanda-Urundi* from 1925 onwards, is a case in point. Enacted on August 21, 1925, this law provided for an administrative union between the newly acquired Belgian mandate and the Congo colony. Commenting on the practical implications of the merger, the Belgian representative to the Permanent Mandates Commission stated in October 1925 that "Ruanda-Urundi will take its place on a footing of the most complete equality side by side with the four Congo provinces and will enjoy all the benefits of the large measure of decentralisation possessed by those provinces ... . The Belgian government thought it good, in the interests of the population of Ruanda-Urundi, not to double the already large central services and the technical and medical services established at *Boma*, but, thanks to the administrative union, to extend the working of these services to the mandated territory". Although Ruanda-Urundi was now for all intents and purposes an appendage of the Belgian colony, five or six more years would elapse before it could enjoy the full benefits of a civil administration.[232] In

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[230] Ibid.

[231] Read Paulus, J.P., Droit Public du Congo-Belge, Brussels: Institut de sociologie Solvay, 1959, p. 393; .Morris, H.F. and J.S., Indirect rule and the search for justice, Oxford: Clarendon Press, 1972, p. 287.

[232] The first systematic attempt towards the introduction of a uniform system of administration was made in 1929, when, at the request of the Minister of Colonies, a series of general administrative inquiries was conducted in each of the administrative subdivisions (territoires) of Rwanda and Burundi. As a result, a set of general instructions was issued by Vice-Governor General *Voisin*, in 1930, which specified the goals of Belgian policies in Ruanda-Urundi in these terms:

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the meantime, the day-to-day tasks of administration remained largely in the hands of the military and at first did not extend very far beyond the immediate requirements of peace and order.

Many reasons can explain Belgium's slow pace in initiating administrative reforms. The customs and institutions of the indigenous societies of Ruanda-Urundi were unlike any found in the Congo; their social and political organisation seemed unusually, perhaps unnecessarily, strange to the Belgian officers on the spot; the latter, moreover, by virtue of their training and background showed little concern for the social and political problems connected with the tasks of colonial administration. In addition - and this is a point which Belgian officials repeatedly stressed before the Permanent Mandates Commission - the administrative machinery Germany had left behind was so rudimentary and inadequate that it could serve only as a makeshift arrangement pending the introduction of a new system. One Belgian spokesperson carried the argument a step further, intimating that the German record in Ruanda-Urundi did not show a single creditable achievement, and that, consequently, Belgium had been forced to make a completely fresh start: "The Belgian mandate had been set up in a country which had for practical purposes never really come under European supervision - where there was but the embryo of an administrative occupation and no European business interests at all. It was the only mandated territory whose history had commenced for all intents and purposes with the inauguration of the mandate, and where the mandate experiment was not influenced by any colonial past".[233]

To some extent, the effect of legislation was actually to reduce the *Mwami*, the chiefs and sub-chiefs to the rank of simple executive agents of territorial administration since these customary authorities had to abide by the complete assent of colonial authorities. This assertion is supported by the fact that, under the *Charte Coloniale* of October 18, 1908, an Act of the Belgian Parliament, which, for all practical purposes was the Constitution that remained in force until independence, the ordinary legislator was the Belgian king (meaning in fact the Minister of the Colonies). It was confirmed by Article 7 of the *Loi* on the government of Ruanda-Urundi. This eminent legislative power was conferred on the metropolitan legislator by the Belgian Constitution which did not allow any obstacle to the legislator's freedom and it was not limited by the Colonial Charter since the latter emanated

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(1) To respect and reinforce native authority insofar as it is exercised in harmony with civilizing directives. (2) To exercise a close check on possible abuses regarding customary tithes (*présentations*) and compulsory labour (*corvées*). (3) To replace incapable chiefs with candidates designated with the accord of the *Mwami*. (4) To regroup chiefdoms in such a way as to suppress the dispersion of fiefs and make the administration easier and more efficient. The European personnel must realize that without the collaboration of native authorities the occupying power would be impotent and faced with anarchy. *Translated in Lemarchand,* Rwanda and Burundi, *at 64. See also Histoire et Chronologie du Ruanda,* at 25.

[233] League of Nations, Permanent Mandates Commission, 16 Session, 1929, p. 68-9.

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from the same legislator.[234] Except for budgetary matters, the intervention of the Belgian Parliament was not required, and Members of Parliament have always shown remarkably little interest in colonial affairs until right at the end when things started to heat up. The King's legislative acts, called decrees, merely required the advice (but not the consent[235]) of the *Conseil Colonial* which consisted of fourteen members (six elected by the Belgian parliament and eight appointed by the king). Already in 1928 *Buell* pointed out that one of the most striking features of the Belgian colonial system was the absence of any real consultative machinery external to the colonial system itself.[236]

All the executive power was vested in the King of Belgium who, according to Article 22 of the *Loi of March 29, 1911*[237], was assisted by the Minister of Colonies and, in certain cases, by the Minister of Foreign Affairs. In practice, the power was usually delegated to the Governor General and to the Vice-Governor General who was the Governor of *Rwanda-Urundi* and who exercised it by orders.

According to the *décret du Roi* of January 11, 1933, regulating the administrative organisation of the colony, the powers and attributions of Belgian administrative authorities were those of the corresponding authorities of *Congo-Belge*.[238] The districts were administered by the district commissioner (*Résident*) who controlled and supervised the composing territories on the spot. The territorial administrators were under his authority and, according to Article 36 of the 1947 *décret*, their attributions were to maintain or increase the authority and prestige of indigenous chiefs, to foster and promote indigenous institutions; to facilitate relations between Europeans and indigenous people, between the administration and the population, and to facilitate the penetration of civilisation and commerce and progressive exploitation of the territory.

However, one would notice a sort of parallelism between these two sets of rulers: the King of Belgium, the Resident and the Administrator, and on the other side the *Mwami* (king of Rwanda), the Chiefs and Sub-Chiefs. *Ryckmans* observes that the relations with Chiefs in Rwanda were made on two parallel lines, that is, there was actually a European administration and an indigenous administration, each having its own hierarchy. This observation is nonetheless purely theoretical since, in practice, there was a single government in which the native chiefs had well -defined duties and their status was inferior to that of the European official. The line of decision and execution was,

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[234] Reyntjens, Pouvoir et droit au Rwanda, at 53.

[235] In fact, however, only once did the Minister of the Colonies bypass the advice of the Conseil on the occasion of the granting of a mining concession in 1940. Ibid.

[236] Buell, R.L., The Native problem in Africa, New York: MacMillan, 1928, Vol. II, p. 460.

[237] B.O., 1911, p. 358.

[238] B.O., 1933, p. 488; B.A., 1947, p. 1276.

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as *Reyntjens* points out, Resident-Administrator-Chief and Sub-chiefs. Even the hierarchic relationship was not respected; the Administrator was, if he judged it appropriate, in direct relationship with the sub-chiefs. [239] Otherwise it would not have been possible for the Belgian administration to impose its authority to the Rwandan people.

Clearly, there was nothing remotely resembling a system of representation. Although in the framework of the transition from indirect rule to internal self-government, advisory councils were established with the *Bami (*kings*)* of Rwanda and Burundi in 1952 and these councils were indirectly elected at all levels from 1956 onwards, the first direct legislative elections were organised only in September 1961, a mere nine months before the two countries" accession to independence on July 1, 1962.[240]

As regards the relations between the executive and the legislative branches of government, the image was one of a monolithic exercise of power by an unfettered colonial government, be it the King of Belgium and his Minister of Colonies in Brussels or the Governor General in *Léopoldville* as represented by the Vice-Governor General in *Bujumbura*. The consultative or censorial organs were appointed by the Governor General (the *Conseil du gouvernement* in *Léopoldville*) or by the King of Belgium and an uninterested Parliament (the *Conseil colonial* in Brussels). Therefore, the opinion of *Robert Martin* for Commonwealth Africa certainly was also valid for former Belgian Africa and remained so up to independence. He rightly stated that three attributes of legislatures in liberal-democratic constitutional theory were absent in early colonial Legislative Councils:

> First, the executive was in no way responsible to the Legislature ... . Secondly, the legislature was not even formally representative of the people for whom it was making laws ... . Thirdly, the Legislative Council was neither a supreme nor a sovereign body ... .[241]

The Judiciary was regulated by *Ordonnance-Loi No. 45 of August 30, 1924* amended by the July 5, 1948 *ordonnance*.[242] There were two types of judicial organisation. On the indigenous side, there were the *Tribunal de Chefferie*, the *Tribunal de Territoire* and the *Tribunal du Mwami*. These courts were competent to judge civil cases opposing indigenous people that were not settled by the application of statutory law, and criminal matters repressed by the custom or by a codified norm giving explicit competence to indigenous jurisdictions. Judgement was delivered according to

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[239] Reyntjens, Pouvoir et droit au Rwanda, at 168.

[240] See infra, The Vicious Circle in Movement: Hutus in, Tutsis out.

[241] Martin, R., Legislatures and economic development in Commonwealth Africa, London: Public Law, 1977, p. 50.

[242] For the study of the amendments, see B.O., 1948, p. 856.

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customary law as long as this law was not contrary to "public order and good morals".[243] The most striking aspect, like in the political structure was that these courts were staffed by Tutsis. In fact, except for some extremely rare cases which did not amount to more than 0.5%, all the autochthonous staff of indigenous jurisdictions were exclusively composed of Tutsi members: judges, assessors, registrars, all appointed and dismissed according to the discretion of the *Mwami*, a Tutsi, or by the *chefs de chefferie*, all Tutsis.[244]

In certain cases, however, indigenous people were also subject to colonial jurisdiction, which applied colonial law to civil and criminal matters. The composition of these jurisdictions shows, however, that the judicial system was in effect part and parcel of the executive branch. The judge of the *Tribunal de Police* was the territorial administrator, while the *Tribunal de District* had the district commissioner as sole judge. The *Tribunal de Parquet*, the single most important court with general civil and criminal jurisdiction, was staffed by a member of the public prosecutor's office (*Ministère Public*) which was part of the executive branch. Moreover, the territorial officers were allowed to preside over all the so-called native courts in their jurisdiction, and all judgements of these courts were subject to review by the *Tribunal de Parquet*.[245]

In time some of the policies adopted in the Congo provided a new pole of attraction for the testing and sorting out of native institutions. This is best illustrated by the introduction of the above-mentioned "native tribunals" in 1936. Despite the disastrous results of earlier experiments along these lines, it was assumed that the native tribunals would become the most effective instruments of indirect rule in the context of the mandated territory. In the mind of the Belgian Resident, the native court system would provide the master key to every problem of native administration. The native tribunals would act at one and the same time as "a safeguard of traditions and a brake upon their evolution", as "a melting pot in which past and present tendencies (would) coalesce", and as "the means whereby a progressive and progressionist, yet slow and smooth, assimilation could be

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[243] Id.

[244] Minani, F., Evolution des institutions rwandaises, *in Les constitutions et les institutions administratives des Etats nouveaux, Compte rendu de l'Incidi,* Brussels, 1956, p. 125. *Minani* claims that the consequence of that unilateral composition was "partiality and corruption of indigenous tribunals". This partiality was without appeal since the courts of appeal had the same composition as the courts of first and second instance. The Hutu peasant whose rights had been infringed was driven either to take the law into his own hands or to give up his rights. However, no concrete example has been available to support *Minani's* assertion, but one could suppose that, in case a Hutu was wronged by, say, a privileged Tutsi (a chief or sub-chief), the Tutsi judge would be inclined not to rule in favour of the Hutu especially if one is to consider the inferior status of the Hutu in the then society.

[245] For a detailed study of Rwandan courts during the colonial era, see Reyntjens, Pouvoir et droit au Rwanda, at 153-160.

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achieved".[246] In fact, these tribunals became the instruments through which the ruling Tutsi oligarchy not only retained but abused its privileges. Their function was not so much to dispense justice as to legitimise abuses and wrongdoing. Since they were in every case headed by Tutsi chiefs it is difficult to imagine how they could have served a different purpose. Although the *Mwami*'s tribunal was intended to serve as a court of appeal the long delays resulting from the accumulation of pending litigation often amounted to a denial of justice. Thus, with an average of only sixty cases handled each year, the *Mwami*'s tribunal was faced with a backlog of some 900 untried cases by 1949, a situation described by the *Résidence* as "clearly alarming".[247] If further evidence were needed to dispel illusions about the true nature of the Rwandan court system, the following statement by a former Belgian official would suffice:

> The native tribunals never played a moderating role because they were intimately linked to the political authorities. In many cases these tribunals were the organs used by the Tutsi to give a semblance of legality to their exactions. ... The only way to redress these injustices was to seek the annulment of iniquitous decisions from the *Parquet*, but the number of applications was so great that it was impossible to examine each demand.[248]

Furthermore, Tutsi participation in the judicial system as clerks, interpreters, and assessors enabled the Tutsi to manipulate the courts to their own advantage. *Gravel* provides a description that illustrates this point. He finds that even after "feudal" agreements had been formally abolished, Tutsi lords still managed to enforce feudal obligations, through the Belgian courts. The Tutsis would bring to court Hutus who refused to perf00orm the "customary duty" of mending the Tutsi lord's fence. Not realising that this obligation was the primary symbolic manifestation of the fealty relationship, Belgian judges would rule in favour of the Tutsi.[249] This shows us how our bomb was being activated by arbitrariness and partiality of the indigenous justice.

On the other hand, this brief account suggests that the use of *Paulus*' use of, "administrative State", as applied to the Belgian colonial state, is adequate: at the imperial level, the Minister responsible for the colonies had only a nominal responsibility toward a parliament not very interested in overseas affairs, while the Governor General was subject to no local control at the territorial level.[250] The denial to the indigenous people of the right to participate in political life up to the last days of colonial rule is

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[246] Résidence du Ruanda, Rapport Annuel, Kigali, 1938, mimeo., Part II, Chapter 2. Translated in Lemarchand, Rwanda and Burundi, at 75-6.

[247] Id., 1949, at 78.

[248] Anon., "Note sur les causes des troubles du mois de Novembre 1959 au Ruanda", unpublished document. Translated in Lemarchand, Rwanda and Burundi, at 77.

[249] Gravel, P., Life on a Manor in Gisaka *in Journal of African History, vi, 3 (1965), p. 331.*

[250] Paulus, Droit Public du Congo-Belge, at 393.

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certainly one of the most striking 0features. The intentional character of this state of affairs is well illustrated by what *Paulus* wrote as late as 1959:

> ... presently, social problems exist ... but these have no political character whatsoever. The Belgian authorities must ensure not to be overtaken by events that would transform social claims into political programme. These territories are not ready yet for these questions ... Blacks have no notion allowing them to understand our political reasoning ... .[251]

This statement is consistent with the ideology of colonial rule, which never claimed to uphold democratic values. Based on unfettered rule by an alien power, it is in fact the antithesis of representative government and thus of respect for fundamental human rights. Having learned it during colonial rule, Rwandan rulers would apply this system, *mutatis mutandis*, for post-independence government.

The lack of commitment by Belgium to promote the development of democracy in her Central African territories explains the very late emergence of political parties in Rwanda, Burundi and Zaïre (now Democratic Republic of Congo). Created during the second half of the 1950s, they generally were based explicitly on ethnic solidarity. In Zaïre, the only national party, the *Mouvement National Congolais,* was founded in October 1958, less than two years before independence. The short experience with parties as vehicles of mobilisation and communication explains the ease with which President *Mobutu*, after his assumption of power in 1965, was able to resume the political style of his Belgian colonial predecessors. The *Mouvement Populaire de la Révolution* (MPR) created by him in 1967 did not show the slightest autonomy from the government and was simply part and parcel of the administration in which it was integrated rather than the other way round as was claimed by *Mobutu*.[252] It was exactly the same process for the *Mouvement Révolutionnaire National pour le Développement (MRND)* of President *Habyarimana* of Rwanda and the *Union pour le Progrès National (UPRONA)* of President *Bagaza* of Burundi. As regards the *MRND*, as explained in detail in Chapter two, it was a party-state created by *Habyarimana* to safeguard the interests of a tiny minority of Hutus from *Gisenyi* region to the detriment of the Tutsi minority and the remaining Hutu majority. This would not have been the case if the colonists had prepared Rwandans for "self-government and observance of their rights'.

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[251] Ibid.

[252] President Mobutu in *Agence Zaïroise de Presse (AZAP)*, December 8, 1982, quoted by Callaghy, T.M., The State-Society Struggle: Zaïre in Comparative Perspective, New York: Columbia University Press, 1984, p. 219-220.

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1.3.3.4.2 The rights of indigenous people

Indigenous interests can be analysed through the scheme adopted for their protection by Belgian authorities. In his confidential memorandum, the Minister of Colonies advocated the support of customary institutions and Tutsi rulers[253]. He explained that their policy was based on the maintenance of indigenous institutions and that Europeans were there to guide and educate. He said that this policy excluded direct administration and suited countries with ancient and remarkable organisation in which the ruling class provide proof of evident political talents. He stressed that the colonial administration would maintain the royal authority and reinforce it according to tradition, but added that the administration would see to it that, on one side, its assistance would be needed by the royal authority and that, on the other side, the role of feudal lords should not be reduced or annihilated. As regards the Hutus, he said that the administration had to protect them against arbitrary acts of which they were victims and assure them peace, the security of their properties and jobs, and justice. However, he made it clear that the bases of the traditional political institutions should remain intact, since the Tutsis had been established long before and were the only ones who were intelligent and capable of ruling.[254]

This position contradicts itself since the Minister of Colonies did not clarify how Belgian authorities were going to respect and develop indigenous institutions simultaneously. Neither did he explain how they were going to manage to protect Hutus without affecting the very essence of the pre-colonial indigenous political regime. Indeed, the proposed balance was too subtle and theoretical to be put in action, and the colonial administration formulated for itself "one of the contradictions inherent in a policy of indirect rule".[255] This confusion remained until 1951 when the Congolese legislation on indigenous "*immatriculation*"[256], as amended by the May 17, 1952 decree in the sense of a policy of

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[253] Ibid.

[254] The memorandum reads: "... cette politique a pour base le maintien des institutions indigènes. Elle fait de l'Européen le guide et l'éducateur. Elle exclut l'administration directe. Elle est parfaitement réalisable dans les pays dont l'organisation est ancienne et remarquable et dont la classe dirigeante montre des talents politiques évidents ... . Notre administration maintiendra l'autorité royale et la renforcera, conformément à la coutume, là où elle se serait trop affaiblie. Mais elle veillera d'une part à ce que cette autorité ait besoin de notre concours, d'autre part à ne pas réduire trop ou annihiler le rôle des grands féodataires. ... A côté de nos obligations de politique générale, nous avons des devoirs envers les *Wahutu*. Nous devons les protéger contre les actes arbitraires dont ils sont souvent victimes, et leur assurer la paix, la sécurité de leurs biens et de leur travail et la justice. Mais nous n'irons pas plus loin: il ne s'agit pas, sous prétexte d'égalité, de toucher aux bases de l'institution politique; nous trouvons les *Watuzi* établis d'ancienne date, intelligents et capables; nous respecterons cette situation." Official Memorandum from the Minister of Colonies, Franck, L., dated June 15, 1920, Archives Africaines, AE/II No. 1849 (3288).

[255] Reyntjens, Pouvoir et droit au Rwanda, at 66.

[256] The cultural assimilation was proved by a registration certificate issued to indigenous by the colonial administration and enabling them to enjoy rights reserved for Europeans.

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cultural assimilation, was made executory in *Ruanda-Urundi*. In the process of ensuring for Africans "a gradual development towards European juridical status", the colonial government had created in 1948 the "*carte du mérite civique*" which assured its holder of a certain assimilation to Europeans.

On reading the decree, we find the following preamble, which explains the precise significance of this doctrinal reform:

> *Immatriculation*, according to the Colonial Charter, is an instrument by which certain indigenous people are assimilated with non-natives in regard to their civil status by being made subject to civil laws of the European pattern. According to the explanatory statement, the immediate aim of the decree is to grant the benefits of *immatriculation* only to those of the native élite who have genuinely adopted the Western form of civilisation... . This policy implies that the legal assimilation of ... *immatriculés* with non-natives is carried into effect not only in regard to civil status but in all spheres of the law where common rules of life require it.

Amongst other conditions, the applicant was required to have reached the age of 21 years and to show, by his or her education and way of life, that s/he had reached a stage of civilisation at which s/he was capable of enjoying the rights and fulfilling the duties laid down in the written law.[257] In order to define these criteria clearly, the report of the Colonial Council pointed out that it was not sufficient to have a European education; the applicant had to show by his or her actions that s/he was guided by that education and followed its tenets. It was not sufficient to live more or less in the European style; a training which would enable him to understand civic life as regulated by the law was necessary.[258] The application was submitted to the President of the *Tribunal de Première Instance* who, assisted by four assessors, conducted the interrogation that enabled the Court to acquaint itself personally with the personality and maturity of the applicant. A successful applicant who then became *immatriculé* was allowed to become subject to the system of civil law and to be assimilated among Europeans in matters of juridical organisation, procedure and competence, movement at night, access to certain areas, and other matters.[259] This brought about a discriminatory legal system in which the "*immatriculés*" as well as Europeans were subject to the statutory law only, whereas the "*non-immatriculés*" were subject to customary law as well. As the colonists had already marked their preference for the Tutsi ruling class on the basis of the "*Hamitic*" theories, one can imagine that Tutsis would normally be given preference to Hutus. Although no documentation on concrete cases of immatriculation has been available, the incident of Fathers *Bernard Manyurane* (Hutu) and *Gerard Mwerekande* (Hutu) is worth discussing to show the unfairness of the law on *immatriculation*. In

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[257] 1952 Decree, art. 2. Brausch, G., Belgian administration in the Congo, London: Oxford University Press, 1961, p. 20-28.

[258] Conseil Colonial, 1952 Rapport, *reprinted in Lumumba, P., Congo My Country, London: Pall Mall Press, 1961,p. 52.*

[259] For details about the "*immatriculation*", see Brausch, Belgian administration in the Congo, at 20-28.

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August 1955, both priests were detained for 24 hours in *Karubanda* prison for having entered Hotel *Ibis* in *Butare* to greet *Charles Kabayiza*, their former secondary school classmate, a Tutsi office clerk at the *Chefferie* of *Nyabisindu*. The custom was that "a *non-immatriculé* was not allowed to enter Hotel Ibis".[260] Although this example does not suffice to generalise the *Hutu* marginalisation as regards *immatriculation*, one may wonder who would be more "civilised" than a priest. It would not be unfair to consider priests de facto *assimilé* simply because they were the first élite in the country; first élite because, from the onset of the process of colonisation, the native priests, although very few, had been the only Africans to receive a complete higher education, and because they had lived side by side with the Europeans for many years, in contrast to the secular élite who lived on the other side of the barrier. Their education[261] was provided by Europeans and, together with their character and way of life, it had undoubtedly brought the native priests to a degree of civilisation equal to that of the European priests whose life they shared,[262] and it seems that there was little justification for subjecting them to the same procedure as the ordinary Rwandans whose level of development may be in doubt as far as *immatriculation* is concerned.

Moreover, although the number of "*immatriculés*" was very insignificant because of cultural reasons and, therefore, just about the entirety of the population remained subject to customary law in civil matters, the fact remains that, beside this legal duality private law (customary law and European law), even public law was divided in such a way that indigenous rights were very reduced. As indicated, an indigenous political organisation existed beside the colonial organisation; common law jurisdiction operated alongside indigenous jurisdiction and certain penalties were applied specifically to indigenous people; and in labour law, the regime of the work contract was different according to whether one was indigenous or not.[263] Commenting on this discrimination in comparison with the British colonies, *Rubbens* contends that "the most ferocious Anglo-Saxon colour bar had never produced such discriminatory laws, neither had it enacted discriminatory measures as rigid as those of the Belgian trusteeship".[264] In the light of the politico-social relations prevailing in Rwanda, these discriminatory measures would, to some extent, be another reason for revolution.

The *Charte Coloniale* explicitly declared some rights and freedoms of the Belgian constitution to be

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[260] Interview with Kazigaba, 12 July 1998.

[261] Twenty years of study, including 6 years of primary education, 6 years of secondary education, 3 years of philosophy and 5 years of theology. Abimana, T., Mission Catholique au Rwanda, Nyakibanda, 1989, p. 8.

[262] Same residence, same table and other things of every day life. Id., at 15.

[263] Vanderlinden, J., Essai de Synthèse *in Gilissen, J., Le pluralisme juridique, Bruxelles: Editions de l'Université, 1971, p. 41.*

[264] Rubbens, A.S., Le Colour-Bar au Congo-Belge, *in Zaïre, 1949, p. 503.*

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applicable in overseas territories. Articles 7, (1) and (2), 8 and 9 guaranteed individual freedom with the principles *"nullum crimen sine lege"* and *"nulla poena sine lege"*; Article 10 guaranteed the privacy of the home; Article 11 protected the privacy of property; Article 12 forbade the penalty of general deprivation of property; Article 13 abolished the civil death (as a deprivation of all rights); Article 14 guaranteed the freedom of religion, whereas the freedom of conscience was guaranteed by Article 15 and the freedom of opinion by Article 16,1; Article 17.1 provided for the right to education, and 21 guaranteed the right to address a petition to public authorities; Article 22 guaranteed the secret of correspondence and Article 24 assured the prosecution of public officers in connection with their administration. Moreover, Article 2 of the Colonial Charter provided that no measure concerning the press could be taken in violation of norms regulating the press, and Article 3 forbade forced labour.

In practice, however, the scope of rights enjoyed by the indigenous people was limited. For example, in the changes envisaged by the administration, the first measure was taken in 1917 by the Resident in his letter No. 791/AS/53, stating that a Tutsi stripping a Hutu of his crops would pay double; a Tutsi grazing his cattle in the Hutu plantations would pay double the damages; it was not allowed to notables to require services not provided by custom. First, the formulation in purely ethnic terms is striking: the Administration operates in a framework of a very simple stereotyped hypothesis in which all the Tutsi are lords and cattle herds-men while all the Hutus are the subjects and agriculturalists. Second, respect for these rules proved difficult to implement, particularly as the administrators, when forced to choose between protecting the weak and consolidating the powerful, opted in general for the easiest way: supporting the authority of the powerful.[265] This has been confirmed by *Bourgeois* who put it that "we have most often considered Tutsis as excellent elements who had our forced labours well executed in their areas, closing the eyes on the abuses that they made on their citizens, violating the common law and the prescriptions of the custom that we have amended."[266]

The Administration took on the existing corvées due to Tutsi chiefs and sub-chiefs by Hutus with reluctance. The most terrible corvee was the *"uburetwa"* which consisted of a set number of days of labour per week. *Mwami Rwabugiri* (1860-1895) introduced the *uburetwa* after a defeat during a military expedition against the *Nkore*. As he wanted to punish Hutus for their misbehaviour during the battle, he ordered that they would have to work 2 days for the Tutsis and 3 days for themselves as

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[265] Des Forges, A.S., Defeat is the only bad news: Rwanda under Musiinga 1896-1931, Dissertation, Yale University, p. 238.

[266] Bourgeois, R., Témoignages, Tervuren: MRAC, T1, 1982, Ch. 5.

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the traditional week counted 5 days.[267] When the Belgian occupation started, each family worked two days out of 3, or 146 days per year. The improvement made by the Belgians was the introduction of the European week (7 days) and the maintenance of the two days in 1924 when the *uburetwa* was reduced to 42 days per year.[268] They established registers to control the regularity of the days worked by everyone. Moreover, this reform would result in an increased burden for a number of Hutu males, since what was an obligation for a group became an obligation for an individual weighing on every male adult, and recalcitrants were imprisoned.[269] The administration considered that it would have been difficult to go further in the reduction of the required work, which would be seen as a disruption of the politico-social organisation of the country. The 1927 *Rapport* stated that if the chief or the sub-chief were deprived of the right to force Hutus to work for them, they would have neither prestige nor power.[270]

A second reform was made in 1938 when, following the suggestion by the League of Nations to suppress the *uburetwa*, the administration allowed the indigenous people employed in European companies to redeem the *uburetwa* by paying one franc per labour day, or 13 francs per year. This measure was discriminatory: the category of indigenous allowed to enjoy that right comprised civil servants, workers in private companies or for European individuals; catechists; pupils in the second level of primary school; rich Tutsis owning at least 10 cows; and seasonal migrants absent from their chiefdom for at least nine months a year.[271] However, this measure concerned the indigenous able to pay the required amount, or those who were out of customary areas; or those who were economically active in a field which would suffer from repeated absence or all the three categories combined. This shows that the administration had to see to it that the Belgian economic interests would be maintained, especially in the mines and plantations.[272]

The colonial era was a period of duress. Other kinds of labour were also imposed on the population. The *Ordonnance-Loi of* October 4, 1943 allowed the Governor to impose unpaid works considered as of public interest. This was the case of the *akazi* consisting of road building, and the execution of

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[267] See Rwabukumba, J. & Mudandagizi, V., Les formes historiques de la dépendance personnelle dans l'Etat Rwandais, *in Cahiers Etudes Africaines, 1974, p. 22.*

[268] Rapport 1924, p. 7.

[269] Reyntjens, Pouvoir et droit au Rwanda, at 134.

[270] Rapport 1927, p. 37.

[271] Rapport 1938, p. 75.

[272] Reyntjens, L'Afrique des Grands Lacs en Crise at 137.

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certain other works considered to be in the community's interest or workers" interest.[273] By that legislation, people were required to involve themselves with salaried work and productive plantations, the reforestation, anti-erosion work, etc. However, it should be noted that these works were introduced during the transition from a subsistence economy to a market economy and one has to remember that the *ubuhake* system studied in section one was supported by the Belgian administration as profitable for their indirect rule. Finally, the individual peasant, in most of the cases, was actually unable to support all those demands and saw himself exposed to unceasing punishment. As a consequence, many people emigrated to neighbouring countries. "At the end of the twenties, around 50,000 Rwandans or one male adult out of six emigrated each year."[274] Reports show that a missionary estimated that, in some parishes, up to 75% of young men were leaving in 1949 and in 1959, before the revolution, 350,000 Rwandans had already left to Uganda, 35,000 having gone to *Tanganyika,*[275] and an unknown number to the Congo (which was also under Belgian rule) where there was, at least, no *ubuhake* system.

But, if some people managed to escape the forced labour and the taxes, the situation was worsened for those who remained at home, since neither the indigenous authorities, nor the Belgian administration, gave consideration to that exodus to review their demands. As a consequence, the remaining people were subjected to carrying the full burden as manpower had decreased.[276]

Contrary to the ideas of universal human rights, which forbade slavery and forced labour (except as part of a criminal sentence), the colonial regime maintained the personal bonds of *ubuhake* and forced labour systems in which the most miserable people were the Hutu, whose situation became worse than it was before the occupation. However, by accumulation of even a little monetary income, the "Hutus gradually acquired the confidence and economic basis enabling them to envisage changes".[277] In the last section of this chapter, this observation will be elaborated, together with other factors, to assess the concept of human rights consciousness, as well as the way changes were made.

As regards education, to reconcile the Tutsi political monopoly with the needs of a modern and

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[273] See also *Ordonnance* No. 52 of November 7, 1924; *Règlement du Résident du Rwanda No. 89 of August 17, 1931, No. 11 of December 22, 1944* and *Ordonnance* No. 70/A.I.M.O of November 20, 1944.

[274] Des Forges, A.S., Kings without crowns, at 335.

[275] For a more detailed study, see Chrétien, J.P., Des sédentaires devenus migrants: les motifs des départs des Burundais et des Rwandais vers l'Uganda 1920-1960, *in Culture and Developpement, 1978, p. 71-101.*

[276] Ibid.

[277] Latham-Koening, A.L., Ruanda-Urundi on the threshold of independence, *in The World Today, 1962, p. 289-290.*

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rational administration, it was necessary for the administration to train notables. According to the principle of indirect rule, this training was reserved for Tutsis. *Major De Clerk* had already tried to convince the Chiefs and the court to send their young men to mission schools. The *Mwami* and a number of feudal lords resisted because education was considered a poison *(uburozi)* which destroyed traditional beliefs, so they sent only clients" sons, bastards or under-gifted children that represented no threat to the Tutsi nobility to the Christian schools. When the Administration became aware of this practice, *Major De Clerk* and the *White Fathers* explained to *Musinga* that the Administration intended to employ more and more trained young people to hold the commanding posts. As a matter of fact, if the court refused to allow young Tutsis from important families to acquire the required competencies, these commanding posts would be distributed to trained Hutus or Tutsis from poor families. *Mwami Musinga* understood this danger and explained to the *commissaire royal* that his objection concerned the religious nature of the established schools and promised to send Tutsi children to school.[278]

As indicated, Belgians, when assuming control in 1916, continued the policy of reliance upon Tutsis. Their belief that the Tutsis were naturally gifted rulers helps to explain why the Tutsis could resist any change in their status. In order to ensure that the existing elite would be educated, the Belgians favoured Tutsis when recruiting students for the administrative schools. There was fear that educating the non-ruling classes would result in disturbances such as had occurred elsewhere in Africa, where newly-educated youths refused to recognise the authority of their traditional rulers.[279] In its report commenting upon the invidious effects of educating non-ruling groups, the Ministry of Colonies stated:

> Their spirit of independence grows, whereas prestige and authority decrease; little by little respect for indigenous institutions disappears and the traditional social organisation collapses before new controls have been imposed.[280]

This shows how the policy of indirect rule favoured discrimination against Hutus. The Belgian administration refused to recognise that traditional social organisation would have to be significantly altered to adapt to the Universal Declaration of Human Rights. The 1924 report corroborated their refusal by stating that the Minister of Colonies had noted with pride that almost all of 932 students in

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[278] Reyntjens, Pouvoir et droit au Rwanda, at 107-108.

[279] Gouta gives examples of Burkina Faso and Sénégal where the "new generation" considered themselves as French and "refused to abide with traditional rulers such as opposing excision and refusing the authority of chefs in conflict resolution beside common law courts". Gouta, N., Post-colonial state-nations in West Africa, Douala: KUN, 1986, p. 141.

[280] Rapport sur l'Administration du Rwanda-Urundi, 1924, p. 29, as translated by Atterbury, Revolution in Rwanda, at 20.

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school that year were Tutsis.[281]

The Belgian attitude in this regard is blameworthy because of its short-sightedness. The reliance of Belgian authorities upon the Tutsi superiority indeed was not a preparation of Rwanda for democratic rule and respect of human rights standards. The 1938 report explains:

> The Government is convinced that it must attempt to maintain and consolidate the traditional cadre of the ruling Tutsi class, because of their outstanding qualities, their undeniable intellectual superiority and their talent for command.[282]

As a consequence, the civil and military structures operated to keep the Hutus in a subordinate position politically, economically, and socially.

Deprivation of individual rights and freedoms was common during the colonial era in the areas of human endeavour, from economic activity to politics. Apart from the inequality between Hutus and Tutsis, Rwandans in general were not allowed to enjoy equal rights with Europeans. For example, the *Rugina v Governor* case shows how indigenous people were deprived of their freedom of religion. The case was judged by the *Tribunal de Première Instance du Ruanda-Urundi* in 1943.[283] In this case, a Hutu member of the Jehovah's Witnesses was prosecuted for possessing five books entitled *"Délivrance"* and two books entitled *"Jehovah"*. He was convicted by the *Tribunal de Parquet du Ruanda*. He appealed on the grounds that his arrest was inconsistent with Belgian legislation, which recognised freedom of religion for the indigenous. Second, he argued, the arrest was arbitrary because "any act in deprivation of the use of these books by the indigenous of this territory is an infringement of, or at least a non-compliance with, the terms of the Royal instructions, which impose on the Governor a duty to promote religion among indigenous people".

On the first ground, the court accepted that the Belgian law applied to *Ruanda-Urundi* but held that "the application of Belgian law to a colonial territory did not restrict in any way the power vested in the local authority to take action for the peace, order and good government of the territory. It was permissible for the local authority to take action which might not be compatible with the principles of Belgian law, as what might be appropriate in Belgium might not always be expedient in an African colonial dependency." The court held that religious matters were "subject to the control of the local

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[281] Id., at at 22. The official doctrine regarding education provides further evidence of Belgian fear of disturbances: "Education ought to convey only knowledge which the natives will find useful in the social role which each of them is called to play. To act contrary to this rule is to risk creating a class of ill-adapted and uprooted persons who cannot avoid being a disruptive element". Id., at 29.

[282] Id., at 21.

[283] Mweya, L., Faith in the last days, Lusaka: MacMillan, 1989, p.21.

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authorities if, in their views, such matters required some control." It distinguished between matters that were fundamental to freedom of worship, like the Holy Scriptures, and those that did not go to the root of worship, and whose curtailment would not diminish the enjoyment of the freedom of worship:

> ... when, however, the case involves books containing politico-religious teachings of a kind noticeable in those under review, the matter assumes a different complexion. Politico-religious discussion among the educated invariably excites controversy, and its propaganda among primitive people may lead quite feasibly to misconception. Consequently, the court is not prepared to say that the deprivation of literature of this order is an interference with any principle of natural justice.[284]

Regarding the second ground for appeal (incompatibility with Royal instruction) the court held that "the prohibition of politico-religious teaching was justified as such teaching had the potential to undermine peace and order in the territory." The court concluded that "the arrest was valid and was within the power and duties entrusted to the Governor" and the sentence to three years' imprisonment was maintained.

Although this case is the only one available, it shows, to some extent, that indigenous people, or at least Jehovah's Witnesses, did not enjoy freedom of religion, since, as *Mweya* explains, two churches were burnt in *Remera* and *Rubavu*.[285] The rights of indigenous people were subordinated to the overriding need to preserve law and order, which was the principal preoccupation of the colonial government.

The administration had yet another powerful instrument at its disposal for maintaining order and preventing political action. The executive branch held wide-ranging powers of arrest for breach of the public order. A decree of 3 June 1906[286] authorised arrest without warrant and detention for up to a month by any agent exercising a territorial command. The decree of 5 July 1910 further empowered the Governor General, the provincial governors and the district commissioners "to relegate undesirable persons", who could be banished or deported without any judicial remedy being available to them. In deed it provided that any native of the colony who by his conduct endangered public tranquillity could be forced to stay away from a certain area or to reside in a specified place. Finally, when action taken against individual hotheads appeared insufficient, the decree of 31 July

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[284] Translated in Mweya, Faith in the last days, at 31.

[285] Id., at 44.

[286] Kundt, L.K., Colonization or Dictatorship?, n.p, n.d, p. 6.

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1920[287] allowed for collective punishment. Occupation of a village or group of villages could be ruled upon if they were "in a state of collective lack of submission", characterised either by the systematic dispersal of the population at the arrival of European agents, or in case (a majority of) the population refused to execute the duties imposed by laws, decrees or ordinances. The costs of the occupation by a territorial agent accompanied by a contingent of the *Force Publique* were to be borne by the occupied village, which, in other words, financed its own punishment.

As regards press freedom, the provision in the *Charte Coloniale* to the effect that no measure should be taken in press matters, except in conformity with the laws and decrees governing the press in fact left the area wide open to discretionary intervention by the Executive. The basis for this discretion was laid by the *Ordonnance-Loi* of March 5, 1922, confirmed by the decree of August 6, 1922, which purported to regulate the introduction, circulation, publication, sale and distribution in the colony of newspapers and periodicals. The ordinance was extended to *Ruanda-Urundi* by the *décret* of June 10, 1929. The need to legislate on this matter had been prompted by the fact that "certain seditious pan-negro pamphlets, printed in America, were distributed in some countries including Congo and began stirring trouble among some black readers".[288] The 1922 text allowed the Governor General to forbid the introduction and circulation of newspapers or periodicals published abroad. It further required a prior authorisation by the Governor General for any newspaper or periodical to be published in the Congo or *Ruanda-Urundi.* This authorisation could be withdrawn at any time. Over the years, dozens of publications were thus banned, most of them on the grounds that they were communist, pan-Africanist or indecent (e.g. the Belgian Communist Party daily "*Le Drapeau Rouge*" and the U.S. produced "*The Negro World*").[289] Measures that restricted the freedom of the press considerably were maintained until the last days of colonial rule.

According to *Pétillon*, who was later to become Governor General:

> If the draftsmen of the *Charte Coloniale* have not guaranteed the freedom of the press to the inhabitants of the Colony, it is because they feared the abuses that such a freedom could engender in a country whose primitive populations constitute an easy prey for the subversive activities of elements intent on disturbing established order. The draftsmen's concern was therefore to apply an adequate regime to the situation of a colony that had not yet reached a sufficient maturity to enjoy the freedoms that are the hallmark of civilised peoples gained for the

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[287] Id., at 7.

[288] Paulus, Droit Public du Congo-Belge, at 387.

[289] See for instance the banning of "*Quinze*" and "*Congo*" in 1956: Van Bilsen, A.A.J., Vers l'indépendance du Congo et du Ruanda-Urundi, second edition, Kinshasa: Presse Universitaire du Zaïre, 1977, p. 96-99.

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> cause of order, after a slow and long evolution.[290]

The problem was that there was no substantial evolution towards "maturity", as the colonists took no significant measure to eradicate inequalities between Hutus and Tutsis and to implant democratic values in the minds of Rwandans. The colonists apparently did not regard democracy and human rights as a priority.

Similar reasons to those regarding the press were advanced to subject the freedoms of association and of assembly to stringent control by the executive branch. Here again, *Pétillon* explains the reason for the denial:

> ... the Governor General needs far-reaching powers because he is responsible for maintaining the security and peace of populations whose credulity, passions and heterogeneous composition constitute, for agitators, elements of revolt that are much more docile and manipulative than those of civilised countries.[291]

Preventive measures were thought necessary, and they were in fact widely applied, for instance, in relation to trade union action and organisation. Not only the law stood in the way of trade union activities: *Van Bilsen* notes that even the white workers and employees of private enterprises "were jugulated by an all-powerful capitalism, which eliminated the "trouble-makers" by sending them back to Belgium".[292] As late as in 1957[293] the creation of trade unions was subject to prior approval ("*agréation*") by the Governor General, and the Executive retained the discretionary right to dissolve an approved organisation if "it severely contravenes its by-laws, the legislation or the public order". The creation of federations of black and white trade unions was forbidden, thus preventing the emergence of class-consciousness over the race barrier. More generally, an ordinance of 11 February 1926[294] provided that no association of natives could be formed without the authorisation of the district commissioner. Provincial governors were empowered to dissolve associations, and dozens actually were disbanded, mainly in the field of religion, where messianic organisations like *Kitawala* were banned for being "anti-white".[295]

The justification of the gap between Europeans and indigenous people as given by *Pétillon* is highly significant. He contended that the draftsmen of the Act of October 18, 1908 had wished to maintain

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[290] Pétillon, L., Des habitants et de leurs droits, *in: Les Novelles, Droit Colonial*, Brussels: Larcier, Vol. I, 1932, p. 189.

[291] Id., at 191.

[292] Van Bilsen, Vers l'indépendance du Congo et du Ruanda-Urundi, at 96-99.

[293] Decree of 25 January 1957, B.O. 1957.

[294] Kundt, Colonization or Dictatorship?, at 7.

[295] The effect of the hindrance of civil society will be analysed in Chapter two.

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the principles of birth and race, in order to ensure the supremacy of the whites over the blacks so as to allow the former to exercise the civilising role assigned to them.[296] This shows, as a consequence, that discriminatory legislation was not contrary to the *Charte Coloniale*. Thus, a *décret* of 24 July 1918[297] made certain acts an offence if they were committed by natives (e.g. every disrespectful act done or declaration made toward a European agent of the public authority). For example, under the *ordonnance* of 7 April 1937, it was an offence for the natives, but not for the Europeans, to be out of doors between 10 p.m. and 4.30 a.m. in the urban areas. The number and scope of distinctions generally made between the races in many areas of the law (e.g. labour law) made an author complain wearily about the "colour bar" in the late forties.[298]

We see now that the visions of the colonists did not remain intellectual abstractions, but were translated into perfectly real administrative policies. These policies, in fact, dovetailed perfectly with the inner dynamics of the royal system in the late nineteenth century - which was logical since it was their source of inspiration. The Belgian administrative system systematised and rationalised the policies that had been pursued by the Rwandan Tutsi kings. This did not contradict the fact that, during the Belgian administration, the king's power had to be politically reduced because the Belgians had become the real political substitutes of the old kings, whose "descendants were kept merely as ceremonial symbols".[299] At the same time, the system became not only politically dominant, but also culturally hegemonic, and its version of the past became the generally accepted vision because it "explained" the present much better than the real complexities of history. Thus, through the actions, both intellectual and material, of the Europeans, myths had been synthesised into a new reality. And that new reality had become operational, with its heroes and its tillers of the soil. Feelings and social actions would henceforth take place in relation to this reconstructed reality because by then it would have become the only one. The time bomb had been set and it was now only a question of when it would go off.

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[296] Pétillon, L., Des habitants et de leurs droits, *in: Les Novelles, Droit Colonial*, Brussels: Larcier, Vol. I, 1932, p. 191.

[297] Kundt, Colonization or Dictatorship?, at 7.

[298] See Rubbens, Le Colour-Bar au Congo-Belge, at 503-513.

[299] Prunier, The Rwanda Crisis, at 38.

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1.3.4 The vicious cycle in movement: Tutsis out, Hutus in.

1.3.4.1 A contentious end to the deep-rooted order

Ruanda-Urundi was put under Belgian trusteeship on 13 December 1946[300], according to Article 75 of the UN Charter, signed at San Francisco on 26 June 1945, which provided for the establishment of an International Trusteeship System. The basic objectives of the International Trusteeship System were laid down in Article 76 of the United Nations Charter. They included the furthering of "international peace and security" and the encouragement of the "respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion", as well as the encouragement of the "recognition of the interdependence of the peoples of the world."[301] Article 3 of the Trusteeship Agreement provided for periodic visits to the trust territory by the UN Trusteeship Council as a matter of collaboration between Belgium and the UN. The first UN Visiting Mission in 1948 stipulated that evolution towards self-government in the "Territory" would have to be accompanied by progressive changes in the distribution of political power. The Mission's report urged the Administration to "democratise the whole political structure as far as possible and as speedily as circumstances permit. The masses must by degrees be led to take part in the choice of their leaders, and in sanctioning important decisions, the final aim being to achieve an increasingly widespread electoral system".[302]

This and further pressure for change from the United Nations represented a weakening of power for the Belgian Administration. It will shortly be seen how, with the advent of United Nations supervision, both Hutus and Tutsis could plead their case through petitions to the General Assembly and the Trusteeship Council's Mission when it visited the Territory at three-year intervals after 1948. Belgium, placed on the defensive, had to justify its policies in Ruanda-Urundi before the forum of world opinion. Political reform in Rwanda became unavoidable, thus leading to a weakening of power for the Tutsi oligarchy.

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[300] See Trusteeship Agreement for the Territory of Ruanda-Urundi, Approved by the General Assembly of the UN on 13 December 1946, United Nations, *Treaty Series*, Vol. 8, 1947, p. 106-117. Came into force on 13 December 1946, date of approval of the Agreement by the General Assembly of the UN. *Res. 63 (I).*

[301] UN Charter, art. 76 (a) and (c), reprinted in H. Duncan Hall, Mandates, Dependencies and Trusteeship, London: Wtevens & Sons Ltd., 1948, p. 336.

[302] U. N Trusteeship Council, Report of the Visiting Mission T/217 (1948), p. 13. Translated by Atterbury, Revolution in Rwanda, at 34. Criticising the paternalistic attitude of the Administration, the 1948 Mission held that "It is possible that Belgian officials might not all be conscious of this attitude of paternalism reminiscent of the father whose very solicitude prevents him from seeing that his children are growing up and that the possibility of their emancipation has become a reality". Report, at 15.

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Belgium's assignment to initiate reform would be stringently limited by the internal situation in Rwanda. Throughout the colonial period, the Tutsis continued to be socialised to believe in their own superiority. "Any action by the Administration which threatened this superior status would be regarded as betrayal".[303] It was thus not surprising that the first major political reform did not seriously threaten Tutsi supremacy. A 1952 decree provided for a system of indirect elections and appointment to select advisory councils at four levels of the Administration: the introduction of councils at the district and sub-chiefdom levels *(conseils de territoire, conseils de sous-chefferie)* represented an innovation; councils at the country and chiefdom levels *conseil supérieur, conseils de chefferie)* had existed since 1943, but had not been selected by an elective process.[304] Although this broadening of political participation marked an important change, it mainly benefited the Tutsis: the complicated system of electoral colleges insured that almost no Hutu reached the councils at the highest levels of administration.[305]

The decision to abolish *ubuhake* had a greater impact than the 1953 reorganisation of councils. In 1954, the *Mwami*'s *Conseil Supérieur*[306] (High Council) was led to take formal action to end *ubuhake* contracts in Rwanda. Since the High Council was composed almost exclusively of Tutsis, this decision seemed to indicate a trend toward flexibility among the Tutsis. However, this impression largely was an illusion, because, in the first place, the action to end *ubuhake* was calculated to impress the 1954 United Nations Visiting Mission, which was present when the High Council acted on *ubuhake.*[307] Secondly, the measure abolishing *ubuhake* had serious deficiencies: it made no provision for land reforms that were needed to provide pasture land for Hutu cattle. Consequently, abolition of *ubuhake* and the resulting distribution of cattle among Hutus created grave problems involving land shortage. The failure to initiate land reform gave Hutus additional cause to resent their Tutsi overlords, and increased unrest in the rural areas, thus adding fuel to Hutu protests.[308]

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[303] Atterbury, Revolution in Rwanda, at 35.

[304] *Maquet* and d'Hertefelt, Elections en Société Féodale, at 18.

[305] Members of the councils were chosen through a complicated system of electoral colleges. The councils were not representative in the sense of being responsible to the population; this was reflected in the fact that members of the electoral colleges at the sub-chiefdom level were appointed by the sub-chief. Since almost all the chiefs and sub-chiefs were Tutsi, opportunities for Hutu to participate in electoral college voting were practically non-existent. *Maquet and d'Hertefelt, Elections en Société Féodale Id., at 22-25.* Nevertheless, these reforms were hailed by some as progress towards democratization. For example, see Muller, N., "Une étape vers la démocratie (Ruanda-Urundi)" *in Problèmes d'Afrique Centrale XIX, 1953, p. 117-123.*

[306] Also referred to as *Conseil du Pays.* Atterbury, Revolution in Rwanda, at 34.

[307] Id., at 36.

[308] Ibid. The effects of the 1954 measure were far-reaching. By December 1958, 218, 000 cattle had been distributed in Rwanda. This figure may be compared with the mere 700 that were distributed in Burundi. *Belgium, Chambre des Représentants, Rapport du Groupe de Travail pour l'étude du problème politique au Ruanda-Urundi, No. 342, 1958-*

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By far the most significant reform came in 1956 when Rwandans had their first opportunity to participate in direct elections. The scope of the elections was limited, since only posts in the sub-chiefdom electoral colleges were to be filled by popular vote; all other councillor positions would be filled, as before, through the indirect system of electoral colleges. Nevertheless, the experience with direct election had a strong impact: both Hutus and Tutsis knew that, as a result of the 1956 elections, twenty percent fewer Tutsis sat on the sub-chiefdom electoral colleges than had been the case in 1953.[309]

As nationalist movements were growing in other parts of Africa, both the Belgian authority and the Tutsi oligarchy in Rwanda experienced power weakening. The weakening, of course, was relative to the protests being levelled against the existing state of affairs. The fact that there was vocal protest in Rwanda meant that some action would have to be taken. Fifty years of European contact had intensified, not ameliorated, the problem of inequalities in Rwanda. Distribution of these inequalities largely along ethnic and caste lines provided ammunition for protesters against the *status quo*, while, as *Atterbury* put it, "it diminished chances for a democratisation which would not threaten Tutsi hegemony".[310]

Under these conditions, response in the decision-making arena would be crucial, for the nature of the response would determine whether protesters could be satisfied within the existing framework, or whether they would attempt to destroy the established system and reconstruct one more amenable to their aspirations. Unfortunately, colonial rule in Rwanda had done little to prepare the system to meet the demands that would be placed upon it during the period 1956-1959.[311]

In 1957, Hutu educated elite issued a document, *"Le Manifeste des Bahutu"*[312] in which the

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1959, p. 25, no. 21, and p. 27.

[309] Atterbury, Revolution in Rwanda, at 36.

[310] Id., at 38.

[311] In Rwanda, as in the Congo, Belgium misjugded the amount of time left for preparing the colony for independence. For example, *Antoine Van Bilsen*, a critic of colonial policy, proposed a thirty-year plan for the gradual decolonisation of the Congo and Ruanda-Urundi. But Belgian authorities regarded even thirty years as much too short a time. Although *Van Bilsen* misjudged the amount of time left for Belgium to initiate reforms, he did recognise the precarious nature of his country's position in Africa. He emphasised the need for consensual rule in the colonies, and noted that a small country like Belgium, militarily weak, would be unable to overcome serious (violent) challenges to its authority. Moreover, world opinion would not sanction the brutal application of force. He argued that "A single mandate justifies colonisation -that is consent, the attachment of the indigenous population to those who are their educators, to those who have brought them the key to a new and better world, of well-being and liberty". *Van Bilsen, Vers l'indépendance du Congo et du Ruanda-Urundi, at 175.* In 1957, *Van Bilsen* issued a warning concerning the Hutu problem: "We must make a concerted attempt to emancipate the Hutu, to educate the rural population, to replace clanic solidarity with social interaction". *Van Bilsen, A., "Plaidoyer pour le Plan de Trente ans" in: Vers l'indépendance du Congo et du Ruanda-Urundi, p. 231.*

[312] The text, written in French under the title "Le Manifeste des Bahutu" can be found in Nkundabagenzi, F., Rwanda

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signatories argued against eliminating legal distinctions among Tutsi, Hutu and Twa. Only by maintaining the distinctions could one determine (in statistical terms) the extent to which progress was being made toward more egalitarian political structures. The Hutus, calling for an end to the Tutsi monopoly of economic, social, and political power in the country, issued a warning:

> It is not as revolutionaries (in the pejorative sense of the word) but as collaborators, aware of our social duty, that we have sought to warn the authorities of the dangers which will inevitably be created sooner or later by the de facto maintenance - even if only in a negative fashion - of a racist monopoly over Rwanda.[313]

What was mostly underlined was the importance of the European presence, and the signatories were asking the Belgians to "not leave the country to self-government, until the inequalities in the system have been removed".[314]

It has been remarked that from 1956 to 1959 the protests were mainly verbal - carried out through activity in the press, and through requests addressed to the incumbent authorities. There were no demonstrations or riots. It is important to recall here the important but ambiguous role played by the Catholic Church. On one side, it contributed to the maintenance of the *status quo* by supporting the principle of indirect rule, thus favouring the ruling class in education and evangelisation. On the other side, on the basis of the principle of equality, there were important exceptions to that practice, which enabled a number of Hutus to study in seminaries. These variations in the attitude of the Church resulted in the development of two types of elite with different historical terms of reference, different ethnic bases and different social orientations. The Church had even opened journalism to educated Hutus who wished to rise on the social ladder. As a number of Hutu élite had been educated in mission schools, access to mission presses was an important factor in their ability to publish complaints against the system.[315]

Prior to the visit of the United Nations' Working Group to Rwanda from April 22 to May 7, 1959, Hutu leaders, *Gitera* and *Kayibanda*, had issued a joint Communiqué proclaiming that their groups only demanded equal rights for the inhabitants of Rwanda, and that they had no personal grudges against the Tutsis. It declared that the crucial problem in the country was the monopoly of political power by one "race", the Tutsi, the political monopoly being the basis of an economic, social and

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Politique 1958-1960, Bruxelles: C.R.I.S.P., 1962, p. 20-29.

313 U. N. Trusteeship Council, Report of the Visiting Mission, T/1402 (1957), Annex I. Translated by Atterbury, Revolution in Rwanda, at 49.

314 Ibid.

315 Id., at 49-50.

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cultural monopoly; and it proposed a number of reforms, including redistribution of land, for the democratisation of the country.[316] The Tutsis issued a bitter response. Their conservative forces launched a campaign of denigration against Hutu leaders, especially *Kayibanda*, *Munyangaju*[317] and *Gitera*, whom they accused of selling out to the Belgians, and of taking bribes to oppose the monarchy and the autonomy of the country.[318]

The reaction of the Tutsi élite to these developments was highly defensive. Starting in 1954, they went on an open counter-offensive, first of all against the liberal Tutsis such as Chief *Prosper Bwanakweri* and his group of young Tutsis from *Astrida* (now *Butare*). These were young educated Tutsis of the best families who, as observed by *Prunier*, not only sympathised with "progressive" ideas, but also thought that they should be used in the reform of their own society, as well as against the colonisers.[319] After the 1953 elections, Chief *Bwanakweri,* who was trying to liberalise social relationships in his own chieftaincy, was targeted by the *Mwami*, who asked the Belgians to "deport" him as a "dangerous" and "subversive" element. [320] He was sent no farther than *Kibuye*, where he was detained, but his political marginalization nipped in the bud any possibility of reform from within the system.[321]

Meanwhile, parties were being formed on an ethnic basis, beginning with the *Mouvement Social Muhutu (MSM)*. Founded in June 1957 by *Kayibanda*, who later became President of the Republic of Rwanda, the movement was committed to a programme indistinguishable from that of the Manifesto.[322] Due to differences in political perspectives, two national political parties were formed. *Gitera*, one of the signatories of the Manifesto, left the *MSM* in November 1957 to create the *Association pour la Promotion de la Masse (*APROSOMA*)*. Although the objectives of this party were to mobilise the common people, both Hutus *and* Tutsis, in a programme of social and political reform,

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316 CRISP, Courrier Africain, No. 3, CRISP, No. 51, p. 13.

317 Aloys Munyangaju, a native of Save in Butare was an active journalist. In 1958 he became editor of *Temps Nouveaux d'Afrique*, a missionary newspaper published in Bujumbura, Burundi. In 1959 he published a tract defending the Hutu position *(l'Actualité politique au Rwanda)*. Munyangaju favoured liberalisation of the system through abolition of caste distinctions and introduction of democratic reforms. *U.N., Trusteeship Council, Report of the Visiting Mission, T/1538, 1960, par. 149.* In October 1959, Munyangaju became President of the APROSOMA party after Joseph Gitera left. *CRISP, Courrier Africain No. 3., CRISP No. 51, p. 13.*

318 Ibid.

319 Prunier, The Rwanda Crisis, at 46.

320 Atterbury observed that *Bwanakweri* was an "outspoken advocate of agrarian reform" after the *ubuhake* was abolished, and had started taking "action in favour of the less privileged". *Atterbury, Revolution in Rwanda, at 52.*

321 Prunier, The Rwanda Crisis, at 46.

322 See Lemarchand, Rwanda and Burundi, at 151.

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the practice showed that it attracted almost no one but Hutus.[323] These two parties confronted the *Union Nationale Rwandaise (*UNAR*)* founded in 1959 and which, although ostensibly dedicated to "the union of all Rwandans for the purpose of achieving true progress in all spheres", and under the nominal presidency of a Hutu, *François Rukeba,* was clearly intended to serve as the instrument of Tutsi supremacy. Its members were mainly Tutsi notables known for their nationalist tendencies.[324] It was "strongly monarchist and hostile to the Belgians, and defended the idea of immediate independence".[325] Unexpectedly, but logically within the Cold War context of the late 1950's, UNAR began to receive money and diplomatic backing from the Communist countries in the United Nations Trusteeship Council. The result was to deepen the antagonism between the Tutsis and the Belgian authorities immediately. As the last Belgian Vice-Governor General wrote in his memoirs:

> From then on, the unspoken agreement which the administration had made in the 1920s with the Tutsi ruling caste in order to further economic development ... was allowed to collapse, also tacitly. The Tutsis wanted independence and were trying to get it as quickly as possible by sabotaging Belgian actions, whether technical or political ... The administration was forced to toughen its attitude when faced with such obstruction and hostility coming from chiefs and sub-chiefs with whom we had collaborated for so many years.[326]

As the Belgians wanted to counter UNAR they had released Chief *Bwanakweri* who, in September 1959, had created the *Rassemblement Démocratique Rwandais (*RADER*)*. This moderate party was hampered by several difficulties. A mainly Tutsi party, it was frowned upon by the monarchist die-hards, while the Hutus never quite managed to trust its liberalism. Also because of its initial Belgian sponsorship, it was constantly accused of being "a government plan in the political landscape".[327] As a consequence, Chief *Bwanakweri* always remained on the fringe of the real action, and liberal Tutsi opinion never had a serious chance of prevailing.

Meanwhile, in order to show a break-off of relations with the monarchy, *Grégoire Kayibanda* had transformed his movement and in October 1959 the *MSM* had become the *Mouvement Démocratique Républicain/Parti du Mouvement et de l'Emancipation Hutu (*MDR-PARMEHUTU*)*. The word "*Parmehutu"* was retained because it contained "*Hutu"* as an attraction for the majority of the population. Other parties were formed, but because of failing to make significant impact, they would leave the field to the two protagonists in this process of polarisation, UNAR and

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[323] Rushayija, S., Le Rwanda en état de révolution. Pladoyer pour la démocratisation *in Revue Nouvelle, 1960, p. 507*; Prunier, The Rwanda Crisis, at 47.

[324] Lemarchand, Rwanda and Burundi, at 158.

[325] Prunier, The Rwanda Crisis, at 47.

[326] Harroi, J.P., Rwanda, du féodalisme à la démocratie (1955-1962), Brussels: Hayez, 1984, p. 241.

[327] Prunier, The Rwanda Crisis, at 48.

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PARMEHUTU, known respectively as the parties of Tutsi dominance and of Hutu challenge.[328]

Unlike in pre-colonial Rwanda where ethnic polarisation had the appearance of common agreement by both Hutus and Tutsis, there now was a new polarisation marked with tensions. From their efforts to eliminate the growing discrepancy between egalitarian values on one hand, and traditional values and institutions on the other, a kind of social disequilibrium was developing between the norms of the traditional society and the aspirations of the new group of emancipated Hutu intellectuals. The most important thing to mention is the ideological polarisation accompanying the political parties and accentuating the predisposition to engage in violence. In the PARMEHUTU manifesto, the Hutus declared that they had no hatred for the Tutsis and that the concern was to up-lift the Hutus who had been kept backward under feudalism. "They would combine their efforts to aid their brothers, but they would be happy to collaborate with those Tutsis who loved Rwanda and recognised the injustices suffered not only by the Hutus, but also by "the *petits* Tutsis". On the other side, UNAR appealed to all Rwandans regardless of ethnic, social, or religious differences "to defend a common cause seeking the political, economic, social and cultural emancipation of the country"; it presented itself as sensitive to the problems of group relations, and as committed to the fight against all forms of provocation to racial hatred.[329]

Kuper[330] has made a very important observation by which one could prove that the future of Rwanda was looming dark and predict the trend of the post-independence State. First, whereas the PARMEHUTU manifesto was concerned with ethnic discrimination against Hutus and sought the eradication of inequality and the establishment of a democratic and egalitarian society[331], the UNAR manifesto ignored the issues of discrimination against Hutus and of Tutsi hereditary privilege, concentrating on a wide series of reforms and measures for development. According to *Kuper*, there was a commitment to democratic conceptions, and to universal suffrage, but this did not easily accord with elitist reservations in its Foundation Charter, to the effect that "Rwandan society was composed of individuals of very unequal values, that it was not equitable to give the same weight to the vulgar thought of the ordinary person as to the perspicacious judgement of the capable man; that

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[328] For details about political parties in Rwanda, see Nkundabagenzi, Rwanda Politique, 1962; Reyntjens, Pouvoir et droit au Rwanda, 1985.

[329] Nkundabagenzi, F., Evolution de la structure politique du Rwanda, thesis, UCL, 1961, p. 95-101.

[330] Kuper, The pity of it all, at 178-179.

[331] The PARMEHUTU manifesto is reproduced in *Nkundabagenzi*, Rwanda Politique, at 113-121. The PARMEHUTU program originally did not call for abolition of the monarchy, but for a constitutional monarchy which would favour the introduction of democratic structures. It called for the democratization of administrative structures (i.e. allowing Hutu access to official positions), promised the vote to women, and expressed the desire that there be five to seven years of experience with democratic institutions in the country before independence should be granted.

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universal suffrage would inevitably result in the subordination of the lettered minority by the uncultivated majority, a situation which would prolong slavery; but that it was nevertheless impossible to deny universal suffrage to the Hutus and that manifest opposition would provide the colonialists with more ammunition".[332] In its discussion of human relations in its Manifesto, "UNAR's real concern was with ethnic relations between Black and White, and not with the issues of Hutu-Tutsi relations raised by PARMEHUTU[333], that is, the problem concerned Belgians and not Hutus.

In terms of immediate major objectives and the main concern being the liberation of the people, the PARMEHUTU manifesto argued the necessity for abolition of the colonisation of Black by Black being a necessary condition for true independence, whereas UNAR, committed to immediate independence, denounced the idea of internal autonomy as a "ridiculous, destructive, divisive collaboration". These ideological differences were part of the struggle for power between traditional authorities hoping to maintain their existing dominance in an independent Rwanda and a new elite seeking radical change in the political structure under Belgian tutelage as a preliminary condition to independence, in which they might hope to rule as representatives of the enfranchised majority.[334]

On November 1, 1959, ethnic violence broke out as a result of a leader of the PARMEHUTU party, *Dominique Mbonyumutwa,* being attacked along his way by young UNAR militants. As rumour had it that he was killed, groups of Hutus organised demonstrations in *Gitarama,* which culminated in a *jacquerie* throughout the country. With Tutsis reacting, hundreds of people died, houses were burnt and about ten thousand people went into exile.[335] Meanwhile, the Belgian government responded by sending troops to the country and a decree on a state of emergency, initially enacted for Congo-Belge, was extended to Rwanda.[336] Contrary to contemporary expectations, however, the Belgian military did not attempt to crush the Hutu revolt, but adopted a *de facto* pro-Hutu policy through the installation of a military-led administration and the appointment of more than 300 Hutu chiefs and

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[332] The Foundation Charter of the UNAR, adopted in a meeting held on August 15, 1959 reads: "Bien que la société rwandaise soit composée d'individus de valeur très inégale, et qu'il n'est pas équitable d'accorder la même valeur à la pensée vulgaire de l'homme ordinaire qu'au jugement perspicace de l'homme capable; Bien que le suffrage universel aboutira infailliblement à l'asservissement de la minorité lettrée par la majorité inculte, situation qui prolongera l'esclavage ... Il est cependant impossible de refuser le suffrage universel aux *Bahutu*. Une opposition manifeste donnerait un argument de plus aux colonialistes ... . Si la minorité Tutsi est vraiment capable et à la hauteur des événements, elle doit, par son energie, influer sur l'opinion publique, étonner le monde par son organisation, son endurance, sa discipline ... . L'organisation immédiate de notre parti ... s'empressera de mâter la sottise et la trahison commune aux êtres incapables de la plus élémentaire abstraction. *Murego, La Révolution Rwandaise, at 821; Reyntjens, Pouvoir et droit au Rwanda.*

[333] Murego, Id., at 821.

[334] Kuper, The pity of it all, at 179.

[335] For details about the jacquerie and its consequences, see Reyntjens, Pouvoir et droit au Rwanda, at 260-264.

[336] B.O.R.U., 1960, p. 759. It was extended by *O.R.U. No. 221/109 of 10 May 1960 (See B.O.R.U., 1960, P. 759).*

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sub-chiefs to replace the Tutsi incumbent after their flight, transfer, resignation or physical elimination.[337] As the territory was under a state of emergency, it became difficult for the Belgian military authority to transmit orders and messages to the population in the customary order of *Mwami*-chief-sub-chief. Colonel *Logiest*, the Special Resident, decided to appoint Hutus in the vacancies that were created and in many others after dismissal of a great number of Tutsis.[338] He considered that in such a situation of Hutu revolt, Hutu chiefs and sub-chiefs would be better understood and obeyed by the population than Tutsis, mostly since Tutsis were chased by the same population and that it was the duty of the colonial administration to restore public order and security.[339]

In reaction, the *Mwami* protested against the changes. He sent a telegram to the Belgian parliament and to the Minister of Congo-Belge and Ruanda-Urundi requesting the rehabilitation of the dismissed Tutsi chiefs and sub-chiefs, but to no avail.[340] Colonel *Logiest* now promoted the political emancipation of the Hutu. As the *Mwami*, his court and the UNAR were deprived of Tutsi chiefs and sub-chiefs, they had lost their traditional power over the population. According to *Logiest*, there were two options: either to keep supporting the Tutsi structure or opening the country to democratization. He considered that the first option would not serve the interests of the majority of the population, while the second would imply a rapid independence.[341] This contention was indeed logical but incomplete since, as far as Tutsis and Hutus were concerned, it lacked proposals as to what could be done to ensure that Tutsis would not be persecuted and that their fundamental rights and freedoms would be respected.

By the decree of 25 November 1959[342], the *sous-chefferies* became *communes*, juristic persons with a chairperson assisted by a council whose members were elected for 3 years by 150 adults each. The chair was appointed by the *Mwami* upon proposition made by the council and the advice of the Resident. He had authority to make administrative and police regulations. As can be seen, the

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[337] Out of 45 chiefs in place before the revolt, 23 had lost their position whereas out of 489 sub-chiefs, 158 had lost their positions. *Nkundabagenzi, Rwanda Politique, at 157.*

[338] In May 1960, the Belgian authorities confirmed the new policy through the setting up of a military territorial guard of 650 men, based on ethnic proportionality, with 85% Hutus and 15% Tutsis. Newbury, The cohesion of oppression, at 197.

[339] Reyntjens, Pouvoir et droit au Rwanda, at 268-269. On March 1, 1960, about 50% of chiefs and sub-chiefs were Hutu, and APROSOMA, PARMEHUTU, or RADER militants had replaced most of UNAR members. *Kagame, A.,* La poésie pastorale au Rwanda, *at 279.*

[340] Reyntjens, Pouvoir et droit au Rwanda, at 270.

[341] Logouts, G., A Propos de "Le Rwanda, son effort de development", *in: Chronique de politique étrangère, 1972, p. 669.*

[342] Decree regulating the political organization of Ruanda-Urundi, B.O.R.U., 1960, p. 372.

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traditional administrative duality between the colonial administration and customary organization was in the process of suppression, mostly since the commune was almost becoming autonomous from the central administration. That is, incumbent Hutus were becoming more important than the Tutsi sub-chiefs were.

On 6 February 1960, a national council composed of 2 members from each of the four main political parties (APROSOMA, PARMEHUTU, RADER and UNAR) was established as a government, replacing all the traditional central structures. Although the *Mwami* was the head of this government under the supervision of the Resident, he protested against the new structure, arguing that it would destroy the country by its economic, social and administrative reforms.[343] Again, there was no reaction to the *Mwami*'s protest. The people now fond themselves to be in the presence of a monarchic regime in which the king became the legalized dignitary while the political and administrative activities fell under the power of the government and the Resident, who was about to step down. On the other side, however, it would have been an opportunity for Hutus and Tutsis to discuss their fundamental problem under the chairmanship of the *Mwami* and the supervision of the Resident and, probably, the United Nations, but, unfortunately, no one made such a proposal at this stage.

1.3.4.2 Establishment of a suspicious order

Communal elections were scheduled for 27 June 1960.[344] However, on 23 March 1960, under the *conseil national*, the four political parties submitted proposals for pacifying the country to *Mwami Kigeri V*. According to their document, the *Mwami* would become a constitutional monarch and symbols of the traditional regime would be suppressed. In particular, one person in a cabinet appointed by the *Mwami* would represent each party; the council would approve all the decrees enacted by the *Mwami*; and *abiru* as well as *Kalinga* would be suppressed. However, the king rejected these proposals[345] on the ground that they were "contrary to custom and a provocation to the monarchy".[346] In reaction, APROSOMA, RADER and PARMEHUTU agreed to form a common front and informed King *Baudouin* of Belgium and the Minister of Congo-Belge and Ruanda-Urundi that they were dissatisfied with and no longer collaborating with the *Mwami,* since he had "refused to

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[343] Reyntjens, Pouvoir et droit au Rwanda, at 276.

[344] O.R.U No. 221/73 of 10 March 1960 (*B.O.R.U, 1960, p. 425)* as modified by O.R.U., No. 221/134 of 3 June 1960 *(B.O.R.U., p. 958)*

[345] See letter dated 23 April 1960 reproduced in Nkundabagenzi, at 201-202.

[346] Reyntjens, Pouvoir et droit au Rwanda, at 276.

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collaborate with his people". They requested a "ministerial" decision on that matter.[347] On the other side, the UNAR had decided to stand aside. It ordered its members to resign from the *conseil national* and announced its refusal to participate in the planned communal elections. Any member taking part in the national council and/or in communal elections "will be excluded from the party".[348] Moreover, UNAR appealed to the United Nations Organization to cancel the elections because they were "undemocratic", but this was not the view of the United Nations according to whom the elections were the prerequisite for democratization of institutions as they would enable Rwandans to freely choose their leaders, as it would also be an occasion for political parties to prove their actual power.[349] The traditional sociopolitical organization of the country was now falling into decline, mostly since even the *Résident Général* declared to have received order "to put an end to the feudal structure and to replace it by democratic structures".[350] Moreover, as the territory was under the state of emergency following the *jacquerie*, no public meeting was allowed and official information was the only means of informing the population. As a consequence, it was not possible for UNAR to boycott the elections. Another factor in the decline of the traditional organization was the colloquium that Belgium agreed to organize in Brussels from 30 May to 7 June 1960, according to the recommendations of the United Nations Visiting Mission of March 1960. It was supposed to gather the *Mwami* and representatives of political parties, but the *Mwami* and the UNAR did not attend.[351] Despite this absence, important decisions were taken: the administration would organize a campaign of information regarding *Kalinga* and the *abiru*; the national council would have more power; and inciting the population to abstain from voting would become an offence.[352] These decisions were important because they concerned a new step of political evolution. But they were also contrary to the interests of the *Mwami* and UNAR, who were absent. This absence marked the gap between the colonial administration and the Tutsis as far as changes were concerned, a gap which was becoming greater while Hutus were getting closer to power, which, apparently would be mono-ethnic. The intransigence and indecision of the *Mwami* and the Tutsis during that crucial time did not give chance to the search of a peaceful transition to the formation of a viable state, which would probably have

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[347] Telegram dated 30 April 1960 reproduced Nkundabagenzi, Rwanda Politique, at 202.

[348] The message was issued by foreign-based UNAR. In fact, after the jacquerie, a number of party leaders had gone into exile, especially in Tanganyika, from where they led the Rwanda-based UNAR. *Reyntjens, Pouvoir et droit au Rwanda, at 277.*

[349] Report of the *Conseil de Tutelle*, 26th Session, 1120th meeting, 1960, p. 24.

[350] Ruanda-Urundi 1960, *in: Bulletin d'information infor-Congo, 1960, No. 4, p. 11.* Author's translation.

[351] One should note that the colloquium was composed of the members of the national council minus UNAR representatives.

[352] For more details about the symposium's decisions, see Nkundabagenzi, Rwanda Politique, at 262.

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safeguarded the monarchy and avoided persecution of Tutsis.

Despite the boycott organized by the UNAR, and joined by RADER[353], the first "democratic" elections took place between 26 June and 30 July 1960 and 229 burgomasters and 2896 communal councilors were elected. Overall, the MDR-PARMEHUTU and APROSOMA obtained the absolute majority in 211 communes, while the RADER had the majority in 6 communes and the UNAR in one commune.[354] In their plans to boycott the elections, the UNAR and RADER had portrayed the elections as "*anti-démocratiques,*" arguing that the Belgian administration was behind the PARMEHUTU terrorism. They warned that a civil war would break out if UN forces did not replace Belgian troops.[355] This reliance on external forces to solve the political crisis shows the distrust Tutsis had in the Belgian administration and the fear of losing their dominance over Hutus. But it also shows that Rwandans were not prepared to solve their own political problems from the beginning of their "democracy". This inability would reappear during successive periods of ethnic strife through 1993 when Rwandans would be led by foreign powers to negotiate their own peace, which would fail and lead to genocide.

Meanwhile, as the Tutsi power was in abeyance, communal elections gave Hutus an opportunity to monopolize all indigenous political and administrative power at a crucial level: the local level of daily contact with the population. Contrary to the United Nations' report that the elections "offered sufficient guarantees..."[356], this sudden disintegration of the *ancien régime* without an adequate transitional period during which Rwandans could learn political tolerance led certain Hutu leaders to retaliate instead of to adopt a policy of unity. Throughout this period, the ethnic confrontation not only continued, but escalated in certain areas, with mainly Tutsis being killed, expelled or exiled, while others were arbitrarily arrested, pursued, and/or forced to buy PARMEHUTU membership cards; in certain communes, Tutsis were dismissed from their jobs in the administration, arrested, and had their houses burnt and pillaged, without any reaction from the Belgian administration.[357] King *Kigeli V* himself opted to leave Rwanda on June 29, 1960, officially to attend independence celebrations in the Congo. However, he, together with a number of other opposing Tutsis, never returned.[358]

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353 RADER withdrew from the common front in July on the ground that the MDR-PARMEHUTU was terrorist and intimidatory. *Reyntjens, Pouvoir et droit au Rwanda, at 281.*

354 For details, see Reyntjens, Id., at 283.

355 Ibid.

356 Kundt, Colonization or Dictatorship?, at 11.

357 Gravel, P., Remera: A Community in Eastern Rwanda, Paris: Mouton, 1968, p. 53.

358 King Kigeri V lives now in refuge in the United States of America. He is appealing to Rwandans to let him go back

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After the elections, the national council was abolished and a provisional council of forty-eight members and a provisional government were established.[359] After consultation with principal political parties, the Resident nominated the members of the council: thirty-one from PARMEHUTU, nine from RADER, seven from APROSOMA, and one from AREDETWA.[360] *Grégoire Kayibanda* was nominated as the head of the government. As King *Kigeri* V had left the country[361], he protested against the establishment of the provisional government. In his two telegrams to the United Nations Secretary General and King *Baudouin* of Belgium he stated that the government was based on communal elections imposed by the Belgian government: "... *les élections communales préfabriquées par le gouvernement Belge sous la terreur de l'occupation militaire ...* ."[362] Within the United Nations' General Assembly, Belgium was facing criticism regarding its policy in *Ruanda-Urundi*. From December 1960 to June 1962, the United Nations called for reconciliation with both the *Mwami* and imprisoned Tutsi representatives on different occasions. However, these protests had no effect and the disintegration of the *ancien régime* proceeded, with appointment of Hutus as deputy administrators of the territory who would later become *préfets*.[363]

Another colloquium was organized by Belgium in Gisenyi from 7 to 14 December 1960 in order to prepare internal autonomy and legislative elections scheduled for January 15, 1961. It gathered 6 representatives of the provisional government and thirteen delegates of political parties, seven from MDR-PARMEHUTU, two from APROSOMA, two from RADER and two from UNAR. Amongst other issues on the agenda was the date of elections. The UNAR and RADER opposed the 15 January date on the ground that it was too early for the pacification of the country, while MDR-PARMEHUTU and APROSOMA clung to that date on the ground of it being the "deadline for independence".[364] This divergence of views was also reflected in the plans presented for the 15th session of the United Nations General Assembly. The UNAR and RADER called for the direct intervention of the United Nations to realize unity in the country; the suppression of Tutsi war-displaced camps in *Nyamata* and *Kibungo*; the reintegration of refugees and compensation for their lost properties; the immediate withdrawal of Belgian troops; the dissolution of both the provisional council and the government; and

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home to restore the monarchy as a solution to the human rights problem in the country. *Letter dated April 23, 1998, Rwandanet, Thu, 21 May 1998.*

[359] Ordonnance Législative No. 221/275 of October 18, 1960, B.O.R.U., 1960, p. 1780.

[360] Ordonnance No. 221/276 of 18 October 1960, B.O.R.U., 1960, P. 1820.

[361] The kingship was however not legally suppressed.

[362] Reprinted in Reyntjens, Pouvoir et droit au Rwanda, at 285.

[363] Paternostre de la Mairieu, at 225.

[364] Higiro, J., La décolonisation du Rwanda et le rôle de l'ONU 1946-62, Thesis, University of Monréal, 1975, p. 160.

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the organization of democratic legislative and communal elections by the United Nations. MDR-PARMEHUTU and APROSOMA called for the deposition of King *Kigeri V*; the immediate and unconditional abolition of the monarchy, the *abiru* and *Kalinga*; the organization of elections under the control of the United Nations, and the institution of a government and an elected Republican President.[365] After the Visiting Mission of the United Nations' Trusteeship Council, the UN General Assembly adopted resolution 1579 (XV) on the future of Ruanda-Urundi: it recommended a conference gathering representatives of political parties and UN observers at the beginning of 1961, before elections, in order to reconcile the differences among the parties and to realize national harmony[366]; and the postponement *sine die* of the elections.[367] Regarding the Mwamiship, it recommended that Belgium should organize a referendum under the supervision of the UN Commission for Ruanda-Urundi.[368] As can be seen, the UN resolutions favored UNAR and RADER, as a result of which a situation arose in which the UN supported the losing party on the ground (Tutsis), at least in its claims, while the rising party (Hutus) was supported by the Belgian administration which was supposed to carry out UN decisions. The greatest weakness of the UN was that they did not manage to find ways to realize the possibility of national harmony contained in Resolution 1579. The entire job was left to Belgium[369], who believed that the country should be given internal autonomy and that the republic should replace the monarchy in the nearest future, without assessing the viability of the subsequent State. In particular, the fundamental question whether Hutus and Tutsis were prepared to live together in peace in the envisaged Republic was not given particular attention. But the Hutu-Tutsi antagonism was quite obvious throughout the Rwandan history, which Belgians knew better than any other foreigner, and the ethnicization of political parties on which the United Nations and the Belgian government were basing their attitudes was not conducive to reconciliation. With power about to be handed over to *Hutus* who had no experience of democracy in a country whose population had developed along ideas of *Tutsi* supremacy and strangeness, as well as colonial absolutism, any expectation with regard to the promotion and

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[365] United Nations' Organization, Fourth Commission, Report of the 15th Session, 1065th-1067th meetings, p. 401-418.

[366] UN, A/RES/1579 (XV), 20/12/1960, Section 4, reproduced in Décolonisation et Indépendance du Rwanda et du Burundi, *in: Chronique de politique étrangère, 1963, p. 569-570.*

[367] Id., section 7.

[368] UN, A/RES/1580 (XV), 20.12.1960.

[369] It happened as if the United Nations had no authority over Belgium in Rwandan matters. For example the Belgian administration was intransigent on the question concerning the return of King Kigeri who had left the country in June 1960. By resolution 1580 (XV), the UN General Assembly had requested the Belgian administration to withdraw its decision on the suspension of the powers of the King and to facilitate his return to Rwanda and allow him to keep his functions until the referendum. Belgium returned back the request from Nyerere, Prime Minister of Tanganyika, to allow Kigeri to land at Bujumbura airport. The UN Commission recognized that Belgium's refusal was a violation of UN resolutions but failed to find a remedy. For details, see Higiro, La décolonisation du Rwanda et le rôle de l'ONU, 1975.

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protection of human rights in the forthcoming State would have no basis. *A fortiori*, the results would have been the same, or perhaps even worse, should the situation have developed in favor of the Tutsis, if one is to believe that "you cannot give what you do not have".[370] It is against this short-sightedness that elections were prepared, that the "Republic" was established and that Hutus took over from Tutsis.

Meanwhile, from 7 to 12 January 1961, Belgium had organized a colloquium according to Resolution 1579 (XV) in *Ostende*, where all political parties were represented. It was decided, *inter alia*, that elections should be postponed but held before the end of the year.[371] Belgium, however, granted internal autonomy on 15 January 1961[372] and recognized the powers and attributions of the provisional *Conseil du Rwanda* and the government, both composed almost entirely of Hutus. On 28 January 1961, the Prime Minister, *Grégoire Kayibanda*, announced the deposition of King *Kigeri V* and the abolition of *abiru* and *Kalinga*. Moreover, the red, yellow and green flag became the symbol of the new Rwanda, which was now a Republic.[373] The Minister of the Interior invited political parties to present candidates for presidential elections and only MDR-PARMEHUTU, APROSOMA, AREDETWA and APADEC participated, since the UNAR and RADER had decided to withdraw from the electoral process.[374] *Dominique Mbonyumutwa*, a PARMEHUTU candidate, was elected President of the Republic at 83% and the assembly, as well as the government, was also almost exclusively Hutu[375], as the traditional State was exclusively Tutsi.

This "seizure of power from above" was indeed supported by the Special Resident, Colonel *Logiest*, who had assured the provisional government that, in case the Republic was proclaimed, he would facilitate its organization and do everything to appease his superior authorities in Brussels and the United Nations in New York. According to him, these initiatives were not contrary to the Belgian policy, which was to set Rwanda on the road to independence under democracy.[376] Although there is no evidence that Belgians aided and abetted Hutus in killing Tutsis, expelling them from their traditional positions and/or forcing them into exile, the fact that the Belgian administration had the monopoly on armed forces suggests that the "Hutu revolution" would not have taken place without

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[370] Jimmy Cliff song, 1979.

[371] Reyntjens, Pouvoir et droit au Rwanda, at 288.

[372] Ordonnance Législative No. 02/16 of 15 January 1961, B.O.R.U., 1961, p. 228-243.

[373] Paternostre de la Mairieu, at 299.

[374] Reyntjens, Pouvoir et droit au Rwanda, at 290.

[375] Except for the Ministries of Defense and External Relations which were held by Belgians. Kagame, La poésie pastorale au Rwanda, at 309.

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the support of Belgium. The revolution itself could be defended inasmuch as it was aimed at eradicating a form of internal oppression, but the fact that it was mainly supported by a foreign power which, paradoxically, had just previously been the main supporter of the *ancien régime*, and that, in any case, civil society was not given a chance to flourish, was not predictive of a successful post-colonial state.[377]

However, the United Nations adopted a different attitude. While the Belgian administration vaunted the victory of PARMEHUTU as that of a "*parti populaire*" that had won more than 70% of the seats in communal councils and expressed the impatience of party leaders for undelayed political change[378], the UN General Assembly adopted resolution 1605 (XV) according to which resolutions 1579 (XV) and 1580 (XV) were maintained and parliamentary elections would be organized in August 1961, with universal and direct suffrage for adults. Moreover, it recommended the institution of a broad-based transitional government while awaiting the elections and appointed a Special Commission to help and advise the administrative authority with regard to the implementation of its resolutions. However, due to the lack of common agreement between the different political parties[379], the Belgian administration enacted a law[380] suspending the Hutu-based transitional government and assembly and conferring their attribution to the colonial administration. This, however, was mere hypocrisy, because Hutu ministers and burgomasters kept their positions and material benefits.[381] As a result, intimidation and violence from the two main parties, MDR-PARMEHUTU and UNAR, accompanied the election campaign. In mid-September 1961, it was reported that 150 people had been killed, 300 houses burnt down and 22,000 people forced into exile in *Astrida* (now *Butare*).[382] However, the two parties were not dealt with on an equal footing with regard to the criminal activities of their members: assassinations and other violence committed by UNAR members were sternly punished and influential party members were arbitrarily arrested, whereas crimes committed by PARMEHUTU members, who most often were burgomasters and communal councilors, were not punished. According to the United Nations Commission, a PARMEHUTU dictatorship was establishing itself

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376 Reyntjens, Pouvoir et droit au Rwanda, at 294.

377 For details about civil society in Rwanda, see Chapter two.

378 See for example the preamble of the Ordonnance Legislative of 15 January 1961, B.O.R.U., 1961, p. 228.

379 Reyntjens says without specifying that the UNAR and RADER required key ministries while the PARMEHUTU was not ready to relinquish and wanted them to take peripheral ministries. *Reyntjens, Pouvoir et droit au Rwanda, at 298.*

380 Ordonnance Législative No. 01/256 of 5 August 1961; Ordonnance Législative No. 01/260 of 7 August 1961.

381 U.N.O., Rapport 4/4994, No. 129.

382 Lemarchand, Rwanda and Burundi, at 195.

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and a repressive regime was replacing the other.[383]

Election results showed that the PARMEHUTU had won with 77.5% (thirty-five seats), UNAR obtained 16.8% (seven seats) and APROSOMA 3.5% (two seats); and that the monarchy and King *Kigeri V* were ruled out by 80% of the voters.[384] These results were confirmed by *Ordonnance Législative No. 02/322* of 10 October 1961, and after *Grégoire Kayibanda* was elected President of the Republic by the new National Assembly, he presented his cabinet containing no UNAR member.[385] Although the UNAR petitioned the PARMEHUTU before the United Nations for its inclusion in government and that PARMEHUTU agree to surrender two ministries[386], as well as a number of posts of secretary of State, prefects and sub-prefects proportional to UNAR's number of seats in parliament (i.e. two prefects and two sub-prefects), the sociopolitical power of Tutsis had come to an end. More important is that there, again, was an appeal to an external authority to solve the problem of internal division among Hutus and Tutsis, which points to the failure of the Belgian mandate to "prepare Rwandans for their self-government and enforcement of their rights". Hutus and Tutsis were not ready for political cohabitation yet, since they had not had time to do so during the colonial era and *a fortiori* during the pre-colonial era. It is not surprising that the PARMEHUTU did not keep its agreement to integrate Tutsis in the local and national government. In fact, a number of posts supposed to be surrendered to UNAR remained in the hands of PARMEHUTU.[387] This reveals the lack of faith of the PARMEHUTU agreement and it will be seen that PARMEHUTU members would even occupy the 2 UNAR ministries. After the *Hutu* regime, it would also be seen that *Tutsis* would use similar faithless strategies to exclude *Hutus* from rule. Meanwhile, despite the uncertainties that related to the viability of the post-colonial State, Rwanda became independent on 1 July 1962, without a constitution.[388] Accordingly, the *Charte Coloniale* became null and void, and the relations between Belgium and Rwanda became those between sovereign States. However, Colonel *Logiest* was appointed Belgian Ambassador to Rwanda while the top Belgian civil servants who had been under the authority of the Rwandan government since the granting of internal autonomy continued their services as technical assistants according to the accord on technical

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383 UN, Interim Report of the Commission for Ruanda-Urundi, Doc. A/4706, P. 51.

384 Reyntjens, Pouvoir et droit au Rwanda, at 303.

385 Kagame, La poésie pastorale au Rwanda, at 328.

386 During the reshuffle of May 1962, UNAR was given the Ministries of Agriculture and Public Health. Reyntjens, Pouvoir et droit au Rwanda, at 305.

387 Kagame, La poésie pastorale au Rwanda, at 331-332.

388 Id., at 341.

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cooperation between the two countries.[389]

It now was clear that the support previously given to Tutsis - being the superior race, able to govern, well organized and accepted by their subjects - was transferred to Hutus as a result of the policy of indirect rule. It does not seem that Belgians, at the beginning of colonization, had planned to, one day, hand over the power to Hutus. It is obvious that the administration thought that some changes would take place, but the policy of maintaining the traditional system and the protection of Hutus from exploitation was itself ambiguous and Belgians did not know exactly what to do in order to, one day, assist Rwandans to be able "to govern themselves and observe their rights". That a number of legal and political measures were taken in order to "civilize" Rwandan is undeniable. But if Belgians were really committed to a democratic Rwanda, they let themselves be cheated by the appearance of everything going well, and the belief that Rwandan people were able to absorb those influences so quickly. Belgians did not know how to instill tolerance in Rwandan minds. After all, there was no assurance that the traditional system – apparently agreed upon - under which Hutus and Tutsis had - been living for about six centuries was not going to be altered within the fifty years during which it was supported by the colonists.

One can also agree that, although the Belgian support had increased the Tutsi authorities' capability to exploit, Hutus had become confident through education, international evolution and the progressive awareness that the system no longer fulfilled its functions.[390] On one hand, however, there was no guarantee that Tutsis would be treated on an equal footing, or even as politically inferior, to Hutus. On the other hand, there was no evidence that Hutus would accept sitting at the same table with their former "oppressors". Overall, the colonists did not think about peaceful cohabitation of both Hutus and Tutsis in a viable state. That is the main reason why the *jacquérie* took place in 1959, in fact opposing Hutus - who were confident of their numerical force and supported the colonial administration - to Tutsis - who were in search of their traditional legitimacy. The colonists just considered that, as independence was around the corner, one of the protagonists would take power and they gave preference to the numerical majority, mostly since, according to Colonel *Logiest*, Tutsis had become intolerant and incapable of ruling:

> Ils s'en sont montrés incapable. Ils n'ont pu admettre l'entrée des Hutu, sur pied d'égalité, dans la vie publique. Ils sont restés prisonniers d'une conception politique et sociale périmée.[391]

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[389] Reyntjens, Pouvoir et droit au Rwanda, at 310.

[390] Ibid.

[391] Colonel Logouts, quoted in Reyntjens, Pouvoir et droit au Rwanda, at 315.

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1.4 Conclusion

The foregoing analysis has shown that disequilibrium was built into the Rwandan system even before the arrival of Europeans. In pre-colonial Rwanda, the political organisation was an instrument of social immobility and the machinery for maintaining the difficult equilibrium between conflicting tendencies in Rwandan society. But the problem had been efficiently solved to such an extent that an optimum point seemed to have been reached. The political organisation that sustained the system of domination could be perpetuated for as long as forces external and/or internal to the system itself remained constant. Obviously, this foundation was not viable, considering that, in human life, the roles and responsibilities of individuals are not static, especially when there are signs of inequality. The situation had the nature of a time bomb because several factors, including external force, the osmosis of new ideas and religions, the effects of conflict and the concept of equality and democracy, in particular, did disrupt the *status quo.*

The few changes introduced during the colonial period not only created new problems but also exacerbated problems that already existed. Indeed, a strong executive power, the refusal of political participation to an "immature population", and the limitations put on the enjoyment of a number of fundamental rights - all considered essential by the Belgians as late as 1959 - were bad signs for a state supposedly being prepared for democratic rule. Besides, colonialism did nothing to suppress ethnicity and centrifugal features in the process of state formation that are represented in the phenomenon examined in this Chapter. Indeed, the exercise of colonial authority through Tutsi rulers sharpened those features, thereby making ethnicity into an instrument of political antagonism. Tutsi elite thought that, in being offered privileged access, however limited, to what was essentially the domain of the colonizers, they were being prepared to "take over", should colonialism come to an end. They would, some thought, be well prepared to run a stable and dynamic system. Then the process of post-colonial state formation suddenly developed in favour of Hutus at the crucial moment of the handing over of the state apparatus to nationals at the end of colonisation. Within just two years, the country was handed over to Hutu republican authorities, thanks to a revolution paradoxically supported by the real holders of power, the autocratic, despotic, and repressive government based largely on the principle of the "divine right of elites". This, indeed, was at the height of the predisposition to engage in violence which stemmed from the long-standing polarisation of ethnicity, unless post-colonial leaders could engage tremendous efforts to stop such violence.

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Unlike in other African countries, the Rwandan revolution was not a reaction against European colonial rule, but a collaborative effort with the European coloniser aimed at the abolition of an indigenous form of imperialism. In a sense, nationalism in Rwanda was little more than a misnomer for "tribalism", a tribalism which, to use *Lemarchand*'s words, drew its sustenance from an "unholy alliance with Belgium".[392] In such conditions, nationalism has some peculiarly freakish overtones. What was left in the way of alternatives was essentially the myth of Hutu solidarity, a myth that was invested with political as well as moral values. Because Hutu solidarity implied a common adherence to democracy, it had become a major ingredient of progress; and just as in the past the myth of Tutsi supremacy tended to be associated with a normative view of society, Hutu solidarity was now regarded as the moral foundation of republicanism. Now, as before, the tendency was to twist the past in order to justify the future, in order to give an aura of legitimacy to the ideals of justice and equality. One is reminded of *Tocqueville*'s words: "Though they had no inkling of this, they took over from the old regime not only most of its customs, conventions and modes of thought, but even those very ideas which prompted our revolutionaries to destroy it".[393]

Since, normally, the essence of a revolution lies not only in the overthrow of the State but in the fundamental transformation of the economic and social structure of society, the Hutu revolution can be considered as being at its very beginning. After this first phase remained the more fundamental task of social and economic reform, one that presupposed the alteration of age-old attitudes and modes of behaviour. That is, the Rwandan revolution must be regarded, at this stage, as "a partial, merely political revolution, leaving the pillars of the building standing".[394]

At this stage, it seems that to be successful, the post-revolution state is liable to undergo the test of developing an ability to effectively impose social control by prescribing and enforcing rules of social behaviour. The imperative for such control over the population should arise from the need to survive in a system where the rate of elimination through civil war is likely to be very high. The State's capacity to organize the population, to extract taxes from it, and to enforce the law without discrimination on a continuous basis should outstrip the comparative ability of ethnic or other societally based organizations to control people. Furthermore, the special purpose organizations of

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[392] Lemarchand, Rwanda and Burundi, at 285.

[393] Ibid.

[394] Karl Marx, *The Critique of Hegel's Philosophy of Right*, in Lewis S. Feuer, ed., Marx and Wingels: Basic Writings, Garden City: Doubleday, 1959,passim.

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the state should not only be efficient but also highly distinctive through the "disciplinary methods of power" contained in their standard operating procedures.[395]

The post-revolution State is also liable to penetrate the Rwandan society and to use the infrastructure of the State to direct, and to co-ordinate societal actions. This view originates from *Migdal*'s argument that "effective social control requires high capabilities from states to extract resources and the penetration of society".[396] Successful social control should be reflected by three indicators: compliance (getting people to behave differently from the way they would prefer to), participation (repeated voluntary action within institutions run or authorized by the State) and legitimacy (voluntary acceptance of the myths and symbolic imagery with which the State justifies its rules of behaviour).[397] The rules of behaviour of the new Rwandan State should be constructed from rewards, sanctions and symbols which, taken together, would offer *strategies of survival* that are supposed to be relevant to the particular conditions Rwandan people have to confront in everyday life. These rules of behaviour run counter to the one-party state, abusive states of emergency, hindrance of civil society, denial of basic rights and freedoms and other stratagems used by absolute regimes such as the one in place in Rwanda during the post-independence period.

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[395] See Mitchell, T., "The Limits of the State: Beyond Statist approaches and their Critics", *American Political Science Review*, vol. 85, March 1991, pp. 77-96 at 92, 93.

[396] Migdal, J.S., Strong Societies and Weak States – State-Society Relations and State Capabilities in the Third World, Princeton: Princeton University Press, 1988, pp. 4, 5, and 30-33.

[397] Ibid.

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Chapter Two

The Failure of the Post-Independence State

2.1 Introduction

Rwanda now entered a challenging era. The "majority" was in power, the Universal Declaration of Human Rights would soon become an integral part of the Constitution[397] and Rwanda would ratify most of the international human rights instruments.[398] Was ethnicity in the process of being solved or aggravated? Was the Hutu regime open to democracy, constitutionalism and the rule of law as claimed by the revolutionaries? What was the status of human rights standards?

In this chapter it is argued that the one-party State, *de facto* in the First Republic and *de jure* in the second, has failed to address the Hutu-Tutsi problem, has denied individual rights and freedoms to most Rwandans regardless of their ethnic affiliation, and has led to one-man rule in which the legislature has been a mere rubber stamp for the party. Moreover, it has made it difficult to change government in a constitutional way and has therefore not been conducive to democratic stability.

The contention is that human rights and the rule of law are more vulnerable in a one-party ethnically based State than in a multi-party State, for various reasons. First, there are few, if any, effective checks on the Executive because of its overwhelming dominance over other organs.

Second, because all the Members of Parliament belong to one party, the government can with ease pass any legislation it wants to, including amending the bill of rights, in any way it sees fit. Although this may happen whenever there is a super majority even in a multi-party State, there is a greater trend to abuse in a one-party State in which the minority is not accommodated, while in a multi-party State critics from the minority may impact on the majority's behaviour. Generally, one-party States are characterised by the total subordination of the legislature to the Executive which is dominated by an all-powerful President who has autocratic powers.

Third, the absence of strong independent organisation such as opposition-parties and interest

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[397] Self-government Constitution, art. 13.

[398] See Marie, J.B., 'International Instruments Relating to Human Rights. Classification and status of ratifications as of 1 January 1998', *HRLJ Vol. 19, No 2-4, Strasbourg, 1998;* Gallagher, A., International Instruments of Human Rights, Strasbourg, 1998, p. 21.

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groups, means that the government's infringement of human rights will often go unchallenged.

Fourth, one-party regimes are often characterised by the absence of an independent press that could expose and criticise violations of human rights. This is because most, if not all, of the print and electronic media are under government control or influence.

Fifth, because a one-party State is essentially undemocratic and generally maintained through repression, there is an absence of a critical public opinion, which in Western democratic societies plays an important role in checking abuse of power by the government.

Lastly, the judiciary, which is considered a sentinel of liberty in democratic societies, fails to protect human rights in a one-party State because of the lack of independence often coupled with intimidation, as well as the fact that it has no natural allies (i.e. free press, critical public opinion, opposition parties, etc) that could support it in the event of a showdown with the executive.

The author will show the impact of the one-party ethnically based system on political rights and democracy through the analysis of the political background to the establishment of one-party rule, the structure of government and the relationship between party and government organs in the one-party State. He will also show how the one-party ethnically based State led to serious erosion of such rights as the right to life, freedom from discrimination, freedom of assembly and association and freedom of expression. Particular attention will be paid to the hindrance of civil society and the abuse of emergency powers by Hutu absolutist rulers in order to maintain their hegemony. The impact of the one-party State on democracy, particularly with regard to the right of Rwandans to choose their own leaders, will also be examined.

2.2 Background to the establishment of the one-party State and absolute regime

2.2.1 Political intolerance

At independence Rwanda had thirteen political parties. In March 1963 President *Kayibanda* assured the nation that Rwanda was embarking on a multiparty democracy in which the less powerful parties were going to disappear. At the time of parliamentary elections in 1965 the PARMEHUTU was the only party to win seats in the National Assembly and to propose candidates. As regards the elections of the local government in 1963, the PARMEHUTU had won 1166 of the seats for communal councillors out of 1192 (97.8%) and 140 seats of burgomasters out of 141 (99.3%), whereas the

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UNAR had won only the mayoralty of *Nyabisindu* and 24 seats of communal councillors, the APROSOMA only two seats of councillors, and the RADER had won no single seat and disappeared.[399] Ten years later, the Office of the President issued a publication stating that the 1963 elections had convinced the Tutsi for good that they should not nourish hope of ruling any more. According to the publication, the Hutu had won and the entire world had recognised that victory and the elections had brought shame on the UNAR and its supporters. It added that, on that day, the MDR-PARMEHUTU had suppressed all the other parties.[400]

From the almost dominant party that it was in 1960, the PARMEHUTU had *de facto* become a unique party within less than five years. However, Article 10 of the Constitution provided for a multi-party government:

> *Les groupements remplissants les conditions légales concurrent à l'expression du suffrage. Ils se forment et exercent leurs activités librement à condition de respecter les principes démocratiques et ne pas porter atteinte à la forme républicaine de l'Etat, à l'intégrité du territoire national et à la sécurité de l'Etat. L'Etat reconnaît l'opposition constructive mais réprime l'agitation destructive.*

The reasons for the demise of other parties, at least inside Rwanda, was different for the three main opposition parties. Concerning the APROSOMA, it was mainly due to the personality of its founder, *Joseph Gitera*. He was, according to *Reyntjens*, a "mediocre" organiser, lacking precise and coherent political ideas, in permanent conflict with his lieutenants, and reckoning on charismatic legitimacy of *"umwami des Hutu"* (king of Hutu). The divisions he created within his party finally led to its destruction: as he suddenly wanted to plead the cause of immediate independence on the eve of the elections, he changed the name of the party into the *Union des Hutu du Ruanda-Urundi (*UHURU*)* which also meant "independence" in *Swahili*. Some days later, he ordered *Nzeyimana*, one of the leaders of the party, to resign. *Nzeyimana* agreed, but became a member of the PARMEHUTU.[401] Some days before the parliamentary elections of September 1961, Gitera caused a new split in the party. He founded the APROSOMA-RWANDA-UNION, while *Munyangaju* and *Gasingwa* continued to campaign under the appellation of APROSOMA. Besides, he founded other ephemeral parties in 1960-61, UNAFREUROP and APROBAMI in particular, which did not facilitate coherence for the APROSOMA campaign, all the more so since *Gitera* pretended to have dissolved

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[399] Vérité et Dialogue, The Rwandan Tragedy. What people should also know, Kinshasa, 1995, p. 4.

[400]The publication reads: " Les éléctions de 1963 ont à jamais convaincu les Tutsis qu'ils ne devaient plus nourrir l'espoir de gouverner. Les Hutus avaient gagné et le monde entier avait reconnu cette victoire; ces élections ont couvert de honte l'UNAR et ses partisans. C'est ce jour-là que le MDR-PARMEHUTU a supprimé tous les autres partis (...)". PREZIDANSI YA REPUBULIKA, Ingingo z'ingenzi mu mateka y'u Rwanda. Imyaka cumi y'isabukuru y'ubwigenge 1/7/1962-1/7/1972, Kigali, Ibiro by'amakuru muri Prezidansi ya Repubulika, 1972, p. 80.

[401]Letter dated 27 August 1960 with copy to Grégoire Kayibanda, national president of the PARMEHUTU.

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it. After the creation of APROSOMA-RWANDA-UNION in August 1961, *Gitera* left the presidency of APROSOMA to *Gasingwa* and took charge of the new party. *Gasingwa* and *Munyangaju* were the only members of APROSOMA to be elected Members of Parliament while APROSOMA-RWANDA-UNION won no seat. *Gitera* quitted the political scene until 1967 when he became member of PARMEHUTU. In 1969 he was elected as a PARMEHUTU member of parliament. *Gasingwa* and *Munyangaju* remained APROSOMA members of parliament until the 1965 elections, and afterwards they became passive members of the PARMEHUTU.[402] The author will show later that, apart from these internal divisions, the PARMEHUTU played an important role in the erosion of the APROSOMA.

Regarding the RADER, as has been seen, its position between the PARMEHUTU and the UNAR was not very comfortable and its possibilities for mobilising and attracting people were limited by the fact that its most prominent leaders were Tutsi. It did manage to establish itself as a progressionist and anti-racist alternative. From 6.6% of votes in the 1960 communal elections, the party dropped to 0.3% in the 1961 parliamentary elections and had disappeared from the political scene by the time of the 1963 communal elections. Its supporters had already joined the PARMEHUTU and the UNAR.[403]

As the UNAR was the creation of great Tutsi chiefs together with the Court of King *Mutara* and aimed at the restoration of the pre-Revolutionary socio-political order, its erosion was different from that of the other parties. As it relied on the support of an ethnic minority, the hope to conquer political power through the ballot box after the revolution was tiny. At the 1961 parliamentary elections it won seven seats out of 44, which was more or less the ratio of Tutsi to Hutu in the country.[404] From February 1962 to February 1963, there were two UNAR ministers in government. Its members of parliament - particularly *Rwagasana* and *Rwangombwa* (until he went into exile in May 1962) - were active in the national assembly by their "excellent and constructive interventions".[405] As indicated, the party had won 25 seats of communal councillors and one of burgomaster in the 1963 elections. It should also be pointed out that the UNAR was handicapped by its division into two wings, one operating inside Rwanda, the other one led abroad by Tutsis who had fled the country following the 1959 revolution. [406] The influence of the latter was important and very negative for a long period until independence.

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[402]Reyntjens, Pouvoir et droit au Rwanda, at 447-448.

[403]Id., at 448.

[404]Verité et Dialogue, The Rwandan Tragedy. What people should also know, Kinshasa, 1995, p. 4.

[405]Ibid.

[406]Id., at 6.

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They, for example, attempted to boycott the 1960 communal elections by launching an attack from Burundi and the Hutu reacted by repulsing them and massacring a number of local Tutsi. Moreover, a number of UNAR members of parliament were forced into exile. *Rukeba*, *Rebero*, *Karema* and *Rwangombwa* were reported to have left the county in September 1961 and May 1962, leaving only three members of parliament from among whom *Rwagasana* was summarily executed in 1963. As a political organisation, the UNAR had disappeared and did not stand for the 1965 elections.[407]

The PARMEHUTU adopted a policy aimed at eliminating other political parties. After he had expressed his attachment to a *"démocratie réaliste et constructive"* in his statement at the first anniversary of the independence, President *Kayibanda* laid particular stress on congratulating himself on the elimination of the opposition. He was pleased about a *"parti majoritaire, d'une majorité écrasante, flanquée d'une minorité d'opposition"*[408] (majority party, an overwhelming majority, with some minor opposition on the side). He said that a proliferation of political parties distracted the population, made the progress of the country inconsistent and caused prejudicial stagnation of the nation.[409]

The PARMEHUTU concentrated its attacks on the APROSOMA and the UNAR. As the APROSOMA's action was practically limited to the only prefecture of Butare[410], *Amandin Rugira*, regional secretary of the PARMEHUTU in *Butare*, took charge of the action from the end of 1960. As the APROSOMA was equally placed with the PARMEHUTU at the communal elections (237 seats for the PARMEHUTU and 223 for the APROSOMA), it won eight *Butare* seats in the legislative assembly established in *Gitarama* on 28 January 1961. A large number of communes in *Butare* were under the control of APROSOMA. *Rugira* started an infiltration of APROSOMA's burgomasters since he was aware that, in a country where the influence of the established authority remained great, the population of a commune would follow the defection of the burgomaster.[411] He persuaded the burgomasters that the APROSOMA had no future as national party, that a struggle between Hutus was to be avoided because it would objectively give an advantage to the UNAR and that, therefore, it would be appropriate to join the PARMEHUTU. This argumentation was often persuasive and, after

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[407]Reyntjens, Pouvoir et droit au Rwanda, at 449.

[408]Paternostre de la Mairieu, at 250.

[409]"Une prolifération de partis politiques distrait la population, rend incohérent le progrès du pays et cause un piétinement préjudiciable à la nation". Ibid.

[410]Except in Cyangugu where the PARMEHUTU and APROSOMA had formed a cartel for the 1960 communal elections and in Nyanza where it had one roll, APROSOMA had no roll in other territories. *Les élections communales au Rwanda, unreported, 1960, p. 19.*

[411]Interview of Amandin Rugira by Reyntjens 15/3/1980 *in Reyntjens, Pouvoir et droit au Rwanda, at 449.*

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committing his allegiance to the PARMEHUTU, the burgomaster would generally explain the reasons for that change during a meeting of the people of his commune. Normally the entire population followed his lead and immediately registered as PARMEHUTU members. This took place from 1961 to 1963 and the APROSOMA had ceased to exist as a political party by the end of 1963. Although there was no formal dissolution, its members had become PARMEHUTU.[412]

In order to achieve its objective, the PARMEHUTU exerted pressure on APROSOMA leaders when it was deemed necessary. *Joseph Gitera,* for example, was put in jail from 21 August 1962 to February 1963 on the initiative of *J.B. Habyarimana*, Prefect of *Butare* and former APROSOMA supporter, and with the agreement of State prosecutor *Tharcisse Gatwa.* He was charged with breach of "State security".[413] As regards *Munyangaju*, following the publication of a *"Manifeste des modérés"* that he had addressed to the United Nations Commission for *Ruanda-Urundi,* pleading for the union of Rwanda and Burundi, he was compelled to resign as Vice-President of the Legislative Assembly and was replaced by *Nzabonimpa*, PARMEHUTU member of parliament. On September 10, 1963, a motion of distrust against the Secretary of the National Assembly, *G. Gasingwa*, presented by PARMEHUTU members of parliament, was adopted. He was replaced by PARMEHUTU Member of Parliament *J. Hakizimana.*[414]

The PARMEHUTU actions against the UNAR were violent and illegal. It often resorted to intimidation, arbitrary arrest and brutality.[415] For example, in January 1962, UNAR leaders in *Kibungo* were arrested, as well as Members of Parliament *Karema*, *Rwangombwa*, *Rutsindintwarane* (President of the party), and *Burabyo* (Member of the National Committee).[416] On March 2, 1962, *Bunagu*, a member of the Prefecture committee of *Kibungo,* disappeared after he had been arrested.[417] The same actions were taken in other areas of the country where UNAR supporters were manhandled. Some of them were arrested and detained for more than a year on a simple *procès-verbal d'arrestation,* others were forced to join the PARMEHUTU by having their signatures appended in the register of members. Furthermore, UNAR meetings and processions were not allowed.[418] Within the National Assembly, PARMEHUTU members of parliament usually abstained

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[412]Reyntjens, Pouvoir et droit au Rwanda, at 449-450.

[413]De Heusch, Massacre Collectif au Rwanda? *In Synthèses, 1964, p. 421.*

[414]Reyntjens, Pouvoir et droit au Rwanda, at 451.

[415]Ibid.

[416]L'unité, No. 2, 1/2/1962.

[417]Id., No. 5, 15/3/1962.

[418]Reyntjens, Pouvoir et droit au Rwanda, at 451.

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from voting for the simple reason that the debated proposal proceeded from a UNAR member of parliament.[419] At the time of the cabinet reshuffle on 6 February 1963, the UNAR ministers were dismissed.[420]

Manipulation was also applied through electoral operations in which everything was done to prevent the UNAR from presenting their list of candidates within the allotted time. For example, Article 37 of the law of 29 May 1963 on elections provided that the list of candidates was to be accompanied by a certificate issued by the burgomaster of the commune of residence certifying that the candidate met all the requirements for eligibility. However, burgomasters very often refused to issue the certificates while PARMEHUTU lists were being processed, even beyond the deadline, July 4, 1963. In *Kibuye*, UNAR lists were not presented for participation in elections because they were destroyed and those which had been reconstituted were rejected on the ground of "late registration". Regarding the registration of voters, a large number of UNAR members were not registered and did not vote. At certain polling stations, PARMEHUTU militants checked the contents of the envelopes before they were put in the ballot boxes. Most often these checks were not even necessary, since UNAR ballot papers had not been distributed. Votes themselves were counted in a fraudulent way; in some areas the ballot papers outnumbered voters while in others ballot papers in favour of the UNAR were burnt.[421]

Beyond the electoral operations other incidents marked the establishment of a one-party ethnically based rule. At the time of communal elections held on August 18, 1963 in *Nyabisindu*, the UNAR had won six out of ten seats for councillors and *Munyanziza* of UNAR was elected burgomaster. This was the only commune not under PARMEHUTU domination. The police arrested, tortured and imprisoned prominent members of the UNAR and their homes, left without defence, were looted. On 4 October 1963, Members of Parliament *Ndutiye*, *Rwagasana* and *Munyanziza* requested that the National Assembly make representations to the Prefect of Kigali for having allowed police officers to shout out and manhandle them despite their awareness that these were members of parliament. The Speaker said that these were simple allegations without any confirmation, refused any debate on the matter and continued with the agenda. Three months later *Ndutiye* and *Munyanziza* were arrested while *Rwagasana* was summarily executed, and this was the end of the UNAR in the country.[422]

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[419]Ibid.

[420]For details about actions against UNAR members, see Reyntjens, Pouvoir et droit au Rwanda, at 451-452.

[421]Id.

[422]Id.

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Earlier sections have shown how the Belgians, from a mixture of expediency and pseudo-scientific racial fascination, adopted their policy of divide-and-rule and reconstructed a neo-traditionalist Rwanda that, in the 1950s, had become more real than it was before the 1890s. However, the 1959 Hutu revolution had not changed the main traits of that construct, but had merely inverted its significance. Tutsis were still "foreign invaders" who had come from afar, but this now meant that they could not really be considered citizens. The Hutus had been the "native peasants", enslaved by the aristocratic invaders: they were now the only legitimate inhabitants of the country. Hutus were the silent demographic majority, which meant that a Hutu-controlled government was now not only automatically legitimate but also ontologically democratic.

During the Tutsi rule, the *petits* Tutsis had felt proud of belonging to the ethnic aristocracy, although it brought them very little beyond that sense of superiority. Now it was the Hutus who persuaded themselves that, because the government was Hutu, they, "the humble peasants from the hills", somehow shared in that power. In both cases the ethnic elites approved and reinforced the delusions of their followers. The Belgians had managed to reinforce the Tutsi aristocratic domination and now it was the foreign aid workers who collaborated in reinforcing the vision of a "democratic majority rule" and who ended up supporting the rise of the Hutu. With regard to the Catholic Church, it had admired the Tutsis and helped them rule, but now admired the Hutus and helped them rule. In both cases, this was perceived and explained as being the work of divine providence and a great step forward in the building of a Christian society in Rwanda.[423]

As in many other African countries, Rwanda became a de facto one-party State after an initial period of multi-party democracy. As shown, the elimination of the opposition was achieved through a combination of various techniques such as intimidation, arrest, physical violence and, sometimes, by negotiation. PARMEHUTU aimed at the extinction of other parties, both Hutus and Tutsis. The outcome was that, in 1965, the MDR-PARMEHUTU was the only party to propose candidates for the parliamentary and presidential elections. Without being fully constitutionalized as such, it nevertheless called itself "National Party".[424] Having eliminated the opposition, the concentration of power within the party increased. Especially from 1968 onwards, numerous conflicts and divisions within the government forced the regime to withdraw more and more within itself. In 1972, the usurpation of power by a small group of politicians from *Gitarama*, President *Grégoire Kayibanda*'s

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[423]From that point of view, a close reading of the quality Catholic-sponsored review *Dialogue* is interesting. Its Kinyarwanda sister publication *Kinyamateka* evolved in the 1980s towards a more critical stance. *See Prunier, The Rwanda crisis, at 81.*

[424]PREZIDANSI YA REPUBULIKA, Ingingo z'ingenzi mu mateka y'u Rwanda, 1972.

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home region in central Rwanda, was completed.[425]

Faced with expressions of discontent, especially on the part of politicians and members of the military from the north, *Grégoire Kayibanda*'s government eventually tried to resort to ethnic tactics. In 1973, violence - initially of an ethnic nature - erupted in schools, in the administration and in business enterprises. Psychologically, these developments were certainly influenced and facilitated by the bloody events of 1972 in Burundi, where Hutus were the victims of genocidal killings.[426]

It must be emphasised, though, that the impulse aimed at expelling Tutsis found its origin within the centre of power, which tried to detract attention from other issues.[427] However, the politicians from *Gitarama* had lost sight of the dynamics such a policy could provoke in a situation where complete control became rather precarious. Thus, the population began to attack the rich (and not only Tutsis); Hutus of the north began to chase those of the central region; politicians of the north shifted their attention from the schools - where everything had started - to the ministries and the enterprises where they felt underrated or ostracised. As certain politicians from the north, especially the National Defence Minister, Major General *Juvénal Habyarimana*, felt in danger of being physically eliminated, he finally decided on army intervention; with an army in which, historically, the north had always been dominant. *Grégoire Kayibanda*'s regime was overthrown in a coup on 5 July 1973.[428] This marked the beginning of the Second Republic under President *Habyarimana*.

After judicial proceedings held in utmost secrecy, a court martial of June 1974 passed death sentences on former President *Grégoire Kayibanda* and seven other eminent personalities from his regime. Others were sentenced to long terms of imprisonment. Even though clemency was granted in some cases, this only had symbolic significance. In fact, during the 1970s scores of dignitaries of the First Republic perished in the infamous "special section" of the *Ruhengeri* prison, whereas *Grégoire Kayibanda*, who was under house arrest in *Kavumu*, died in 1976, having been denied food and the medical care he needed. After the *"révolution morale"* of 1973, the militants of the *"révolution sociale"* of 1959 had disappeared, some through political manipulation, others by physical means.[429]

Immediately after seizing power, General *Habyarimana* outlawed political parties, but about a year

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[425]Reyntjens, Pouvoir et droit au Rwanda, at 498.

[426] For some details about killings in Burundi, see Sahinkuye, M., The Legal Protection of Refugees in Zambia in the Light of International Law, Thesis, 1997, p. 32-4; United Nations Human Rights Commission, Report, 1972.

[427]Reyntjens, L'Afrique des Grands Lacs en crise, 1994.

[428]Ibid.; Prunier, The Rwanda Crisis, at 61.

[429]Ibid.

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later, in 1974, he had created his own, the *Mouvement Révolutionnaire National pour le Développement (*MRND*)*. Explaining his decision, he said that, although he was aware that some people favoured the multiparty system, he had no hesitation in choosing the single party system.[430] *Habyarimana* thought that the mere declaration of a one-party State was hollow unless the Republican Constitution recognised the status of the party as paramount over all other institutions. Thus, in 1976, the MRND National Congress passed a resolution according to which the "*Mouvement* was supreme and the only guarantor of public interests and, thus, the Republican Constitution should reflect the supremacy of the *Mouvement* over other institutions operating in the Republic".[431] Pursuant to this direction from the National Congress, Article 7 of the Republican Constitution was amended to make the party supreme over other institutions. The amendment enshrined one-party rule as a basic value of the regime. It provided for every single Rwandan to be a *de facto* member of the party.[432] This suggests that Rwandans did not need to subscribe to have membership, and that babies and old people were included. It follows that the deprivation of the right to form political parties through which Rwandans could articulate their interests was all the more unjust.

All burgomasters and prefects were chosen from among party cadres. The party was everywhere; every hill had its cell,[433] and the party faithful, hoping for promotion and a professional boost, "willingly spied on anybody they were told to spy on and on a few others as well".[434] All citizens had their place of residence written on their identity cards and changing address without "due cause" was not tolerated.[435] Unless there was good reason, such as going to school or getting a job, the authorisation to change residence would not be granted unless one had friends or relatives in high places. "Administrative control was probably the tightest in the world among non-communist countries".[436]

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[430]President *Habyarimana* to the French journalist Philippe Decraene in *Le Monde*, 7 October 1982.

[431]"Etant donné que le Mouvement (...) est supreme et est le seul garant des intérêts du peuple la Constitution de la République devrait refleter la suprêmatie du Mouvement sur les autres institutions." *Resolutions du Congrès National du* MRND, *quoted in Sahinkuye, M., Cours de Droit Constitutionnel, Butare: Groupe Scolaire, 1991, p. 20.*

[432] 1978 Constitution, Art. 7 (3).

[433]Manifeste et Statut du MRND, art. 43-61.

[434]Prunier, The Rwanda Crisis, at 76.

[435]Article 15 of the *Décret-Loi No. 01/81 of 6 January 1981 (J.O., 1981, p. 55)* empowered the Burgomaster to discretionarily issue and withdraw a residence permit and anyone who wanted to change the residential address had to apply to him.

[436]Prunier, The Rwanda Crisis, at 77.

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Although the MRND obviously was a political party, it is important to mention that *Habyarimana* wanted to hide this fact behind a masquerade of appellation. It was deliberately called *"Mouvement"*. Indeed, the word "politics" was almost a dirty word in the *Habyarimana* regime in which every effort was made to forget - at least officially - that politics existed. When the regime finally decided in November 1981, after eight years in power, to establish a "parliament", it was called the *Conseil National de Développement* and was, according to Article 12 of the MRND Constitution, one of the central organs of the MRND. In this system *Habyarimana*, sole presidential candidate, was triumphantly re-elected in December 1983 and then again in December 1988, with 99.98% of the votes.[437]

During the *Habyarimana* regime, access to power and knowledge was available to very few regional groups in the country, notably in the northern prefectures of *Gisenyi* and *Ruhengeri*. The concentration took place over a number of years and was narrowed down to these two prefectures in the late 1980s. It happened at all levels, but illustration of it will be limited to three examples. In the mid-1980s, the *Gisenyi* prefecture alone arrogated to itself nearly one-third of the 85 most important posts in the Republic, as well as near total leadership of the army and security services. According to a survey dating back to the early 1990s, 33 public institutions out of a total of 68 were under the directorship of people from *Gisenyi* (19 posts) and *Ruhengeri* (14 posts). During the period 1979-1986 the "disparity indices" regarding grants to study abroad read 1.83 in favour of *Gisenyi* and 1.44 for *Ruhengeri*, the worst-off prefecture being *Kibungo* in the East, with an index of 0.67. By 1990, ethnic conflict had been overtaken or even transcended by regional conflict and - within the dominant region - by small-scale antagonisms. For example, the prefectures of *Gisenyi* and *Ruhengeri* were at loggerheads in the north while in *Gisenyi* itself, *Bushiru*, *Habyarimana*'s home area, competed with *Bugoyi*.[438]

Meanwhile, as indicated elsewhere, violence in Rwanda had forced a large number of Tutsis into exile, at first in an almost continuous stream, between 1959 and 1964, and then, after a nine-year interval, in more limited numbers during 1972 to 1973. According to the United Nations High Commissioner for Refugees, the number of refugees had grown to about 200,000 by 1964.[439] The

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[437]Through the official slogan during the 'election campaign' it was hoped that he would be elected *ijana kw'ijana* (one hundred per cent) but MRND activists were disappointed by the missing 0.02%.

[438]Sellström and Wohlgemuth, 1996; Reyntjens, L'Afrique des Grands Lacs en Crise, 1994.

[439]UNCHR, Banyarwanda Refugee Census, 1964, quoted in Guichaoua, A., Le Problème des Réfugiés Rwandais et des Populations Banyarwanda dans la Région des Grands Lacs Africains, Geneva: UNHCR, 1992, P. 18.

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bulk of them had left the country without knowing that they would remain in exile for a long period. Many died, and many of their children were born in exile. As time passed, their situations diverged more and more from each other depending on where they were and on how they fared in life. Personal biographies became increasingly diversified to the point where being a Rwandan refugee could mean anything from eking out a precarious living in a refugee settlement in western Uganda to another working as a journalist in Switzerland, by way of peasants in Zaïre, businessmen in Burundi and social workers in New York City.[440] Despite their extreme geographical dispersion and their increasing social differentiation, the exiled Tutsi remained in touch with one another. As the UNAR memory receded into the mists of history, younger people created in the 1970s a multitude of social clubs and cultural associations to keep people in contact. Their diversity and wide geographical spread reflected the diversification of the diaspora. There was the *Association des Immigrants Rwandais du Québec*, distinct from the *Rwandan Canadian Cultural Association in Ontario*; in Belgium the *Isangano* group organised folkloric shows and served as a place for discussion. There were other similar associations in Bujumbura, New York, Los Angeles, Washington DC, Nairobi, *Lomé*, Dakar and Brazzaville.[441] In Uganda they had created the Rwandan Refugee Welfare Foundation (RRWF) in June 1979 to help the victims of political repression after the fall of *Idi Amin*.[442] In 1980 the RRWF changed its name to Rwandan Alliance for National Unity (RANU). RANU saw itself as more politically militant than the RRWF and openly discussed the question of an eventual return of refugees to Rwanda.[443] At its seventh congress held in *Kampala* in December 1987, under the impulsion of its most resolute militants, it changed itself into the Rwandan Patriotic Front (RPF), an offensive political organisation dedicated to the return of refugees to Rwanda, by force if necessary.[444]

Although the immediate motive for the RPF was the settlement of the, the Front also worked out an eight-point political programme with the aim of structurally modifying Rwandan political culture. The programme accused the Rwandan government of undemocratic and corrupt practices and of ethnic

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[440]Prunier, The Rwanda Crisis, at 64.

[441]Id., at 66.

[442]Given former President Obote's hostility to the Rwandan refugees, they had welcomed Idi Amin's assumption of power in January 1971. Some even served in his 'State Research Bureau'. *Watson, C., Exile from Rwanda: background to an invasion, Washington DC: US Committee for Refugees, 1991, p. 10.*

[443]For details about Rwandan refugees in Uganda, see Prunier, G., 'L'Ouganda et le Front Patriotique Rwandais' *in Guichaoua, A., (ed.), Enjeux nationaux et dynamiques régionales dans l'Afrique des Grands Lacs, Lille: Faculté des Sciences Economiques et Sociales de l'Université de Lille I, 1992, p. 43-9;* Prunier, G., 'Elements pour une histoire du Front Patriotique Rwandais', *in Politique Africaine, No. 51, October 1993, p. 121-38.*

[444]Ibid.

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discrimination. The RPF explicitly projected itself as multi-ethnic.[445]

In June 1990, President *Habyarimana* attended the Franco-African summit at *La Baule* in France.[446] As the West seemed to want to link economic aid with political democratization, President *Mitterand* advised *Habyarimana* to introduce a multiparty system in Rwanda. In July 1990, *Habyarimana* declared that he supported a multiparty system.[447]

On 1 October 1990, the military wing of the RPF, the Rwandan Patriotic Army (RPA), started incursions into Rwanda from Uganda. Some observers questioned the wisdom of the RPF in taking military action at that particular time.[448] The invasion occurred only two months after the thirty-month long talks supervised by the UNHCR and OAU on the refugee problem had led to a ministerial agreement between Rwanda and Uganda that might have led to concrete results, and during a gradually developing political liberalisation process within Rwanda. Although it seemed as if the negotiations might have led to a breakthrough, the RPF, however, was not prepared to wait any more; it was apparently tired of the continued stalling by the Rwandan government. It is, however, argued that RPF attacked at that particular time because a possible breakthrough in the areas of democratization, human rights and refugee repatriation would have diminished the legitimacy of an attack.[449]

Rwandans responded *en masse* to multipartyism.[450] The phenomenon was all the easier since creating a party required only 30 signatures. [451] MRND hoped this regulation would lead to a proliferation of parties, which would, in future, facilitate their manipulation. Nearly ten parties were launched by the end of 1991. Four main motives seemed to push people to pledge allegiance to new organisations.

Some people, particularly among the underprivileged intellectual elite, were motivated by idealistic

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[445]For details about the eight-point political programme, see Prunier, G., *Eléments pour une histoire du Front Patriotique Rwandais, at 121-38.*

[446]Over the last fifteen years, France had slowly replaced Belgium as the tutelary power in Rwanda because it offered financial and especially military guarantees that Belgium could not provide. In 1975 Paris had signed an agreement of military co-operation and training with Kigali and had regularly increased its economic aid. France kept over 400 *coopérants* in the country and its development aid was second only to that of Belgium, with $US 37.2 million in 1990. *Economist Intelligence Unit, Rwanda: Country Profile, London: EIU, 1993, p. 18.*

[447]Speech of the President of the Republic, 5 July 1990.

[448]Prunier, Eléments pour une histoire du Front Patriotique Rwandais, 121-38.

[449]Reyntjens, L'Afrique des Grands Lacs en Crise, at 61.

[450]Prunier, The Rwanda Crisis, at 121-135; Reyntjens, L'Afrique des Grands Lacs en crise, 1994.

[451]Loi No. 28/91 of 18 June 1991, art. 11, J.O., 1991, p. 728.

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expectations of improving the management of their country. For them, multipartyism meant democracy, freedom, justice, human rights, fair governance and, finally, economic, social and cultural development.[452]

Other people took ethnic considerations into account. The MDR, suppressed after the 1973 coup, experienced a revival so spectacular that it quickly became the main opposition party or simply the main national political organisation. In March 1991 in the "MDR appeal", which described its predecessor in glamorous terms, it was mentioned that MDR-PARMEHUTU was the party for the ordinary man and that it had never betrayed its democratic and republican principles: respect of multipartyism, freedom of adherence to the party, free elections at all levels and clear separation of powers.[453] This actually was a fairy-tale view of a party which, without having gone through the constitutional step of declaring itself a single party legally, had nevertheless eliminated all its competitors, rigged its own internal candidacy processes, and acted with intolerance. But the key to its retrospective glamorisation was regional feeling, a strong factor in Rwanda. Moreover, Hutus retained a good memory of that independence party which had "liberated" them from the "Tutsi yoke" in the early 1960s. The *Coalition pour la Défense de la République (*CDR*)* had the ambition to reunite all Hutus "divided for various reasons".[454] The *Parti Libéral (*PL*)* was called the "Tutsi party" although its leaders were mixed. Its grassroots members were predominantly Tutsi, due to discreet propaganda in the recruitment of adherents. For more than one year, the RPF was presented as the "armed party" of the Tutsi diaspora.[455]

Regionalism also played a significant role in the choice of parties. The MDR not only profited from the prestige of the "old liberation Hutu movement" but, for some Rwandans, it also constituted a political force through which southern people could efficiently challenge the MRND, created and dominated by ruling northerners. Some MDR opponents used to discredit that organisation by calling it the "Party of *Gitarama* people". Before 1973, and after the reintroduction of multipartyism, several MDR leaders came from *Gitarama*, which was, besides, a prefecture considered to be the "genuine south" of Rwanda. *Gitarama* had historical reasons for a massive adhesion to an opposition party. The victims of the *Habyarimana* coup in 1973 generally came from that prefecture. Furthermore, as seen, the new regime had arrested and killed about 50 former dignitaries, mostly *Gitarama* people,

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[452]Nsengiyaremye, The Unkown Tragedy, at 85.

[453]Translated in Prunier, The Rwanda Crisis, at 123.

[454]Sellström and Wohlgemuth, The International Response to Conflict, 1996, p. 21.

[455]Ibid.

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including President *Kayibanda*, in prisons, less than five years after the coup.[456]

Considering its base, the *Parti Socio-Démocrate (*PSD*)* had a strong regional colour. Its members usually were educated elite from the south. Contrary to the MDR, the PSD establishment in the north was insignificant. The party's two main leaders and founders, *Gatabazi* and *Nzamurambaho*, were prominent southerners who had been ejected from politics for regionalist reasons. Southern politicians liked to complain about the north, mainly the two prefectures of *Gisenyi* and *Ruhengeri*, which, as seen, held most senior posts in the diplomatic missions, army, state-owned companies and development projects.[457]

Finally, there also were other people who, due to their attachment to or personal feud with President *Habyarimana*, respectively remained to the MRND or left it. After almost two decades of non-shared power, *Habyarimana* had created many enemies or unconditional supporters who benefited from his regime. Apart from the deaths under inhuman conditions of detention of the First Republic dignitaries in the 1970s, *Habyarimana* particularly recorded enemies at the outbreak of the war. It will be seen that the government arrested nearly 10,000 people suspected of complicity with the RPF in October 1990. After six months, following international pressure and for lack of "substantial charges against them", some of them were released. "All these people were rich and/or educated, Tutsi and Hutu victims of jealousy or political suspicions".[458] One year after their liberation, they joined opposition parties in which they used their money and influence with the population to undermine *Habyarimana*'s party, power and prestige.

In general, Rwandans were guided by their feelings (tribalism, regionalism, personal enmity or friendship) in their choice of political parties. Many people, including the literate ones, took no time to read manifestos or to listen to speeches in political rallies. *Nsengiyaremye* concludes that the RPF expertly exploited these feelings to divide the Hutu, weaken them and finally beat them.[459]

Seven months after the reintroduction of multipartyism, *Habyarimana* and his party had drifted. Manipulated peasants forced their MRND-appointed burgomasters, loyal to the former single party, to give up their positions. At rallies people from the hills and opposition members sang "*Habyarimana navaho impundu zizavuga"*, meaning that on the day *Habyarimana* was kicked out, people would

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[456]Nsengiyaremye, The unknown tragedy at 86.

[457]Ibid.

[458]Sellström and Wohlgemuth, The International Response to Conflict, 1966, p. 24.

[459]Nsengiyaremye, The unknown tragedy, at 87.

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applaud. A coalition of the three main opposition parties, the MDR, PL, and PSD, held a demonstration to claim their entry into the government in Kigali in January 1992.

In January 1992, the MRND proposed elections "in order to have a strong government that would be respected by all political forces and would be able to efficiently carry out the war against the RPF".[460] The coalition, which stood some chance of winning the popular poll, refused, thinking that time was not yet ripe as the MRND, which was still in total control of the local administration and the security forces, could rig the elections. In order to put an end to political tensions, *Habyarimana* accepted a coalition government on April 16, 1992. The Prime Minister and nine of the eighteen ministers came from the opposition. From that moment, the development of war changed to the net advantage of RPF. MRND and its chairman lost key departments such as Foreign Affairs, Justice, Finance and Information. Furthermore, the new "opposition" ministers opted for collaboration with the armed movement to crush the former single party.[461]

Habyarimana could no longer control the intelligence services. For long, they had fallen under the direct control of the State House. Now the *Service Central de Renseignement* was split into separate services scattered through different departments. The biggest portion went to the prime minister's office, Immigration and Emigration to the Interior, and the External Intelligence to the Ministry of Defence.[462] The government had to suffer the existence of three distinct intelligence services. Not only did they lack any coordination due to multipartyism, but they were immediately infiltrated by RPF agents in January 1992. Collected vital information was easily minimised, short-circuited or did not circulate at all. "Secret decisions were swiftly transmitted to the RPF".[463]

The government had no such possibilities of spying on the RPF as the intelligence services had no means. The budget allocated to their services was cut and a good number of experienced personnel considered pro-MRND were appointed elsewhere. For instance, Premier *Dismas Nsengiyaremye* appointed *Augustin Iyamuremye*, his personal friend, a veterinary doctor like him, as director of the intelligence services. *Iyamuremye* was quite new to the domain as he had spent years in a rural dairy and only some months as prefect of *Gitarama*. In his career in the intelligence services "he worked more for RPF than for the government and so [did] most opposition ministers".[464] He would

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[460]MRND meeting, 23 January 1992; Radio Rwanda, news bulletin, 20 hours, 23 January 1992.

[461]Id., at 88.

[462]See Organisation de l'Administration Centrale de l'Etat, J.O., 1992, p. 1746.

[463]Nsengiyaremye, The unknown tragedy, at 88.

[464]Id.

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later be appointed Minister of Agriculture for some months after the RPF victory.

While Major General *Paul Kagame*, "an information officer by profession"[465], realising the importance of information services in wartime, reinforced them, Kigali dismantled them. When the hostilities were renewed in April 1994, it was quite amazing to note how ill-informed top army officers and prominent politicians were about how the RPF was militarily prepared. They knew nearly nothing about powerful and committed RPF allies determined to help the Front pound the regular forces. That is why both the population and political leaders, when defeat became obvious, started complaining that their country had been sold and that they did not know it at all.[466]

The pro-RPF attitude of the opposition ministers did not usually stem from personal convictions but rather from political calculations. The four opposition parties, united in what they called *"Forces Démocratiques pour le Changement" (*FDC*),* thought they needed the RPF armed pressure to hasten the fall of *Habyarimana*. Once this goal was achieved, the power would come to the FDC, especially the MDR, which had the strongest popular base and a good portion of government forces, and controlled the premiership, the Foreign Affairs and the Information departments.[467] In its calculations, the RPF had also longed for such a political coalition that, to the eyes of the international community, would prove the determination of Rwandans "to get rid of the *Habyarimana* authoritarian regime". Once *Habyarimana* was ousted, the RPF would impose its domination as the only military force in the country.[468] The FDC and RPF signed a collaboration agreement in *Brussels* in mid-1992.[469]

Many international observers did not see a simple marriage of circumstances in that agreement, or else *Donat Murego*, a leading MDR figure, could not have declared that,

> our relationships with RPF are accidental. We say yes to democracy but by the people; they (RPF guerrillas) want it by the gun. They refuse the changes which took place since 1959. They want to retaliate (...) For them, they are the elite and the niggards. This is the basis of their ideology.[470]

The RPF and FDC found the easy way of ejecting the MRND and *Habyarimana* who, due to

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[465]Ibid.

[466]Such complaint was quite commonly repeated by Hutus in exile. Gouvernement Rwandais en Exil, Le Peuple Rwandais Accuse, Bukavu, 1995.

[467]Interview with Kayihura, one of MDR leaders, 9 June 1997.

[468]Interview with Seth Sendashonga, 12 November 1997.

[469]Nsengiyaremye, The unknown tragedy, at 90; see also infra, *The Fundamentals*.

[470]*La Croix, April 29, 1993.* Translated in Nsengiyaremye, The unknown tragedy, at 90.

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multipartyism, had to abandon the party chairmanship, his position as Defence Minister and Chief of Staff of the army and gendarmerie, and was to require direct peace negotiations. Up to then, the government and the Front had signed a cease-fire agreement at *Nsele* (Zaïre) on March 29, 1991, with President *Mobutu* as the mediator.[471] It will be shown later that the agreement was never respected, as with many others that followed until the peace agreement was signed in *Arusha*, Tanzania, on August 4, 1993.

The government's delegation to the *Arusha* peace negotiations was led by *Boniface Ngulinzira*, Minister of Foreign Affairs. On several occasions, the MRND had complained in Kigali that talks were a secret business between two men: *Ngulinzira* and Premier *Nsengiyaremye*, both from the MDR. President *Habyarimana* was not informed of the development. In fact, *Arusha* appeared more to be an attempt to topple the MRND and *Habyarimana* than to achieve responsible negotiations for a just peace and fair power-sharing with the RPF. Finally, *Habyarimana* refused to clear *Ngulinzira's* journey to *Arusha*. He was replaced with the MRND Minister of Defence, *James Gasana*. Negotiations went straight into an impasse as the RPF did not appreciate the change of chief negotiator on the government side.[472]

One phase of the talks that provoked an MRND outcry dealt with the crucial power sharing agreement. In the name of the government, *Ngulinzira* had accepted to withdraw the Ministry of Interior and the gendarmerie from *Habyarimana*'s party in favour of the RPF which was bestowed with five departments out of eighteen in addition to the vice premiership.[473] Considering the atmosphere of the *Habyarimana* regime during that particular time and in the perspective of elections, giving the Home Affairs and the gendarmerie to the "enemy" was an unbearable betrayal, at least in the eyes of MRND supporters.

On July 17, 1993, *Agathe Uwilingiyimana* replaced *Nsengiyaremye* as Prime Minister of a new cabinet that had a mandate from the President to sign the peace agreement. The sharing-out of the portfolios between the parties was exactly the same as that of the outgoing *Nsengiyaremye* cabinet: MRND nine, MDR four (including the Premier), PSD three, PL three and PDC one. MDR partners in the FDC rejected *Nsengiyaremye* on account of "uneasy collaboration". They alleged that he

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[471]The *Nsele* agreement was later amended respectively in Gbadolite (Zaïre, now Democratic Republic of Congo) on September, 16, 1992 and in Arusha (Tanzania) on July 12, 1992. For details, see J.O., No. 16, 15 August 1993, p. 1264-66.

[472]J.O., No. 16, 15 August 1993, p. 1313.

[473]Ibid.

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despised them and already considered himself the President-elect after *Habyarimana*'s inevitable departure.[474] PL, PSD, and PDC leaders refused to reappoint him.

Furthermore, in that sudden political development, the MRND dismantled the powerful MDR. With the complicity of PL, PSD and PDC leaders, *Habyarimana* designated *Faustin Twagiramungu* Prime Minister of the future transitional government including RPF elements. The *Arusha* accord stipulated that the name of the Prime Minister of that cabinet had to be known before the signing of the peace accord. By appointing *Twagiramungu* as MDR chairman, even though the party was supporting *Nsengiyaremye*, the MDR first vice-chairman, the rival political forces had divided the main national party that they all feared.

Twagiramungu was considered the Hutu politician closest to the RPF. He had a certain ascendancy over *Uwilingiyimana* as it is he who had proposed her for the premiership. Since her appointment as a prime minister[475], *Uwilingiyimana* had to follow *Twagiramungu*/RPF directives to secure her position in the future transitional cabinet.[476] In less than two weeks all the crucial peace talks issues still in abeyance were settled. The *Uwilingiyimana* government notably accepted the coming to Kigali of a 600-man RPF battalion to officially protect the Front's ministers and members of parliament. It also signed off on the future national army and gendarmerie which would be run on a fifty-fifty basis by officers from the former regular forces and from the RPF. Finally, the government and the Front convened on the date for the signing ceremony of the comprehensive peace accord: August 4, 1993, in *Arusha*. With *Uwilingiyimana*, the unblocked peace talks took on a new impetus. *Anastase Gasana*, *Ngulinzira*'s successor, led the government delegation that met the RPF in the buffer zone of *Kinihira* on 23 July 1993.[477]

To most Rwandans, the peace agreement seemed like a real transfer of power from the MRND and *Habyarimana* into RPF hands through negotiations and multipartyism.[478] Most of the presidential powers were given to the Prime Minister, who then became the real strong man of Rwanda. On the RPF and its allies, not only were bestowed the premiership, and the post of the Speaker of the House (the second personality in the country), but also the control of key ministries like those of the Interior, Foreign Affairs, Justice, Finance and Information. The MRND had to maintain a presidency

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[474]Kayihura, 9 June 1997.

[475]For 38 days which later were extended to 9 months due to the political impasse.

[476]Kayihura, 9 June 1997.

[477]Nsengiyaremye, The unknown tragedy, at 92.

[478]Ibid.

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with symbolic powers and five minor departments, besides the Ministry of Defence. The RPF had to accept having 40% of the troops in the army headed by a Chief of Staff from the former government forces and the gendarmerie run by a former rebel officer.[479]

Two important questions, however, are to be examined: Was *Habyarimana* going to accept surrendering part or all of his power? Was the RPF ready for power-sharing?

2.2.2 The government and the strongmen

Since independence, executive power had been vested in the President for the First and Second Republics.[480] All executive power was vested in him.[481] He was the Head of State[482], the Commander-in-Chief of the armed forces[483], and the Party President.[484] Here the President was what Rwandans call *Imana y'i Rwanda* (the God of Rwanda) or *Umubyeyi w'igihugu* (the father of the Nation), just as the *Mwami* was considered before the era of the "Republic". Most strikingly, he embodied the ideal of Hutu "solidarity" just as the *Mwami* once symbolised the ideal of Tutsi supremacy.[485] During the Second Republic, the post of Vice-President was abolished and replaced *de facto* by that of the Secretary-General of the party, who, apart from being responsible for the administration of the party, appeared to be the President's deputy.[486] During both Republics, the President was the head of government administration and the leader of government business in the National Assembly.[487] Cabinet ministers and secretaries of state were appointed at the discretion of the President, who informed the National Assembly afterwards.[488] But in the Second Republic the cabinet was supplanted by the Central Committee of the MRND, which was empowered to formulate government policy and to advise the President with respect to the policy of the party.[489] In practice, the cabinet was only responsible for advising the President with respect to the execution of the policy

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[479]J.O., No. 16, 15 August 1993, p. 1264.

[480]Self-government Constitution, art. 51; One-party Constitution, art 39.

[481]Constitution, art. 49.

[482]Id., art 51.

[483]Id., art. 58.

[484] Id., art. 40.

[485] About the presidential mwami-ship, see Lemarchand, Rwanda and Burundi, at 269-72.

[486]Self-government Constitution, art. 42 (2).

[487]Self-government Constitution, art. 56 (d), (e), (j); One-party Constitution, art. 44 (3), (4) & 64.

[488]Self-government Constitution, art. 56 (a); One-party Constitution, art 44 (1).

[489]MRND Constitution, art. 23.

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of the MRND by the Government.[490] The subordinate position of the cabinet was underscored by the MRND manifesto which enjoined the government to constantly put the policy of the MRND into practice.[491] Besides, the deliberate absence of a provision regulating a possible conflict between a decision of the Central Committee and one of the Cabinet meant that the first would mostly prevail because the Central Committee was third in rank of the MRND central organs, whereas the Cabinet was the last.[492] The President chaired meetings of the National Congress, the Central Committee and the Cabinet.[493] In the local government, Prefects, Sub-prefects and burgomasters were appointed by the President.[494]

Besides, the President of the MRND was the sole candidate for the presidency of the Republic,[495] and in case he was unable to carry on his duties, the Secretary General of the MRND acted *ad interim* until a new President was elected.[496]

Since Parliament was the next to last organ of the party, it goes without saying that all critical discussion of Legislative proposals was confined to the superior organs, particularly the Central Committee[497] and the duty of Parliament was merely to pass laws in accordance with the instructions of those organs. This was underscored by Article 27 of the MRND Constitution, which subjected the Acts of Parliament to the *"esprit du Manifeste"*.[498]

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[490]Id.

[491]"(...) L'Etat doit (...) adapter constamment la politique du Mouvement Révolutionnaire National pour le Développement à (..) l'évolution économique, sociale, et culturelle." *Manifeste et Statut du Mouvement Révolutionnaire National pour le Développement, p. 13.*

[492]Article 12 of the MRND Constitution provided for the hierarchy of the central organs: the presidency of the MRND; the National Congress; the Central Committee; the National Assembly; and the government.

[493]One-party Constitution, art. 44 (4); MRND Constitution, art. 13.

[494]One-party Constitution, art. 44 (5); *Décret-Loi No.10/75, art. 4, J.O, 1975, p. 299; Loi of 23 November 1963, art. 38 as modified, Codes et Lois du Rwanda, Vol. II, second ed., 1995, p. 913.*

[495]One-party Constitution, art. 40.

[496]Id., art. 42.

[497] The Central Committee was so important that Article 7 of the 1978 Constitution provided for the privilege of jurisdiction for its members: they were justiciable by the only *Cour de Cassation* for any judicial matter.

[498]One-party State Constitution, art. 69-79. Under the MRND, the parliament was called *"Conseil National de Développement"*, and was one the organs of the party, the *"Mouvement Révolutionnaire National pour le Développement"*. MRND Constitution, art. 27 par. 2.

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2.3 Impact of the one-party State on democracy, political rights and civil society

Although the word "democracy" has been defined in many different ways, President *Habyarimana* agreed in 1974 that the definition "with the greatest universality of acceptance" was that of *Abraham Lincoln* which defined it as a "government of the people for the people".[499] But about one year later, *Habyarimana* added that democracy under the MRND was "the most suitable type of government to Rwanda".[500] To what extent did the one-party State conduce to democracy? One of the most articulate proponents of one-party rule, *Julius Nyerere*, the former President of Tanzania, has argued that,

> Where there is one party and that party is identified with the nation as a whole, the foundations of democracy are firmer than they can ever be where you have two or more parties, each representing only a section of the community.[501]

The focus of this part is the undemocratic nature of both Party and General Elections, as well as the hindrance of the Rwandan civil society. The operation, in practice, of the one-party State in Rwanda gave the lie to this proposition. The author argues that the one-party State in Rwanda was undemocratic. The readers will see that people who did not belong to the MRND were completely excluded from standing for political office and Rwandans were not allowed to articulate and defend their interests as individuals and as members of organised groups. Moreover, freedom of speech in general and in Parliament was severely restricted. The author also argues that the one-party State failed to build national unity in Rwanda.

2.3.1 Election of the President

Under the circumstances, the presidency could not be made an object of political competition, almost like the *Mwami* was irremovable. One could challenge the *Mwami*'s claim to power only at one's own peril. Since his authority was by the grace of the gods, it could be taken away only by divine sanction. Thus, the whole purpose of presidential elections was not to provide opportunities for replacing the incumbent but, rather, to affirm his permanence in office.[502]

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[499] Habyarimana interviewed by Radio France Internationale, 11 April 1974. Author's translation.

[500] Speech during the launching of the Mouvement Révolutionnaire National pour le Développement (MRND), 5 July 1975. Author's translation.

[501] Nyerere J.K., Democracy and the party system, 1974, p. 7.

[502] Even in the First Republic in 1965, as in 1969, Kayibanda had also run unopposed and received over 90% of the votes. *Rwanda, Carrefour d'Afrique, September-October 1965, p. 3.*

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The Office of President, as already shown, was the most powerful in the country.[503] A presidential candidate had to be a Rwandan citizen and at least 35 years old.[504] The one-party Constitution did not allow for a plurality of candidates to contest presidential elections. Article 40, paragraph 2 provided that the President of the MRND was the sole candidate for the presidency of the Republic and that, if he should not gain the majority of the votes, another President was to be nominated for the MRND so that the election of the President of the Republic could take place.[505]

The National Congress met every two years.[506] At the proposal of the Central Committee, the MRND President was appointed by the National Congress.[507] Further procedures for the election of the President were laid down by the MRND Constitution and articles 60 to 64 of the law regulating elections.[508]

In the elections for President of the Republic, voters had to be given an envelope containing two ballot papers, green and grey. The green was to remain in the envelope, while the grey was to be discarded if the voter wanted the MRND candidate to be President and vice-versa, if not. In order to become President, a candidate had to obtain at least 51% of the green paper votes. This was not difficult to accomplish as the entire State and party machinery, as well as all the media, were mobilised to campaign for the election of the MRND candidate. Moreover, in many rural areas the grey paper was not given to the voter, everything was pre-arranged in such a way that the only formality for the voter was to put the green paper in the envelope and leave everything in the ballot box. Most often this was done openly in the presence of a vote officer. Furthermore, no one was allowed and no one dared to campaign against the election of the party candidate since the President was to be elected *"ijana kw'ijana"*(one hundred per cent).[509]

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[503]The real power in the Party resided in the President. Under articles 13, 22, 23 and 62 of the MRND Constitution, 1976, the President could, *inter alia:* create offices in the party; preside over meetings of the Party Congress; exercise discretion with regard to items for discussion by the Central Committee or the National Congress and could add or delete any item from the agenda of a meeting; give instructions on any matter to any official or member; take any disciplinary action against any member of the Party on the grounds of a Member's misbehaviour; take any decision or any action which in his opinion was in the best interest of the development or security of the Party, government and the State, etc.

[504]One-party Constitution, art. 40, par. 3.

[505]Article 40 reads: "Le Président du Mouvement Révolutionnaire National pour le Développement est le seul candidat à la Présidence de la République; s'il n'obtient pas la majorité des voix exprimées, il sera pourvu à la désignation d'un nouveau Président du Mouvement Révolutionnaire National pour le Développement et l'élection du Président de la République aura lieu (...)"

[506]MRND Constitution, art. 18.

[507]Id., art. 14.

[508]*Loi No. 18/1983 of 27 August 1983, J.O., 1983, p. 501* as amended.

[509]*Ijana kw'ijana* was the official slogan during the 'election campaign' organised and sponsored by the MRND.

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In practice, no genuine elections for the office of party President were ever held, as no person was allowed to challenge the incumbent President. A personality cult grew around General *Habyarimana*, whom party propaganda portrayed as indispensable for the continued unity, peace and development of the country.[510] In the 1970s the government directed all citizens in rural areas to stop using the name of "General" for the large bags of about 100 kilograms that they used for storing their crops or for carrying coffee to the market, as the title was reserved for *Habyarimana* only.

Anyone who was considered to be critical of the "father of the nation" was vilified as being "power-hungry, fed up with peace, and unpatriotic by the party bosses, whose very careers were closely intertwined with that of the President.[511] The sycophants around *Habyarimana* realised that, without him at the helm, they would lose their positions of tremendous power and prestige. As a result, both Republican and MRND Constitutions were designed to preserve and enhance *Habyarimana*'s position as President, to the exclusion of everyone else.

2.3.2 Appointment of the Central Committee

Under Article 22 of the MRND Constitution, the President was the only one empowered to appoint and dismiss members of the Central Committee. The Constitution did not stipulate any requirement for a person to be appointed as a member of such an important organ. Even the National Congress had no authority over this issue. In 1986, Professor *Claver Karenzi* told President *Habyarimana* that people were curious to know what the requirements for becoming members of the Central Committee were. As a response, President *Habyarimana* immediately appointed him.[512]

The Central Committee was subordinate to the President. As a result, Members of Central Committee owed their positions to the President and were personally loyal to him, rather than to the people of Rwanda whose interests the *Mouvement* was allegedly meant to serve.

As already indicated, it is also significant that elections of Presidents were themselves not democratically conducted. Almost all the delegates to the National Congress, apart from Members of Parliament, were presidential appointees or nominees. They were selected primarily for their "unqualified and unswerving loyalty to President *Habyarimana*".[513] The majority of the people of

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[510]Nsengiyaremye, The unknown tragedy, at 99.

[511]Ibid.

[512]This appointment was done in order to shut up the Professor and he, indeed, never asked his question again.

[513]Nsengiyaremye, The unknown tragedy, at 65.

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Rwanda therefore had no say whatsoever in the selection of delegates to these organs. What was even worse was that the delegates did not exercise independent judgement and allowed themselves to be manipulated and dominated by the President.

2.3.3 Election of Members of Parliament

As indicated above, only those people believed to be convinced party militants and whose candidature was approved by the Party Central Committee, were allowed to contest the elections. Thus, a majority of the people were deprived of the right to participate in direct running of the affairs of their country, contrary to Article 21 of the Universal Declaration of Human Rights. Furthermore, by using the power to disqualify candidates, the non-elected Central Committee reduced the choice of candidates who were available to the electorate. The electorate was, thus, denied the right to freely choose candidates who could represent their interests effectively, because candidates who stood up for the people's interests were invariably vetoed.

The way in which the parliamentary elections were conducted left much to be desired, as candidates were not allowed to campaign freely. They had to make campaign speeches only at meetings organised by party officials. No individual campaigning was allowed. Candidates were not even allowed to campaign through the press.[514] Moreover, the candidates were not free to choose their own campaign topics but could speak only on topics chosen by the prefectural party officials and approved by the Central Committee.[515]

Because of the undemocratic nature of the presidential and parliamentary elections and the recognition that the regime could not be changed through the ballot box, there was widespread apathy towards voting among registered voters. Although no statistics were made available so as to assess the curve, a trend towards participation by fewer and fewer voters was observed.[516]

2.3.4 Discrimination on the grounds of political opinion

The one-party State inevitably involves discrimination against people who do not belong to the party. In fact, all non-party members are completely excluded from participation in the political process. As

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[514]Id., at 110.

[515]Ibid. All candidates were required to address every meeting together. Each candidate was required to address the meeting on any of the following topics: the MRND objectives; development since independence, need for unity; meaning of development; economic recession in the world and how it affected Rwanda; meaning of peace; how to combat crime and vagrancy; and problems in the Constituency.

[516]For details, see Nsengiyaremye, The unknown tragedy, at 110.

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in the First Republic, only MDR members could contest presidential, parliamentary and communal elections. In the Second Republic, all the important policy making organs in the country, such as the National Congress[517], and the Central Committee[518] excluded people who were not believed to be convinced members of MRND. Yet these were the organs responsible for, *inter alia*, choosing the sole presidential candidate and members of parliament. The significance of this can be appreciated readily when one considers that real power in a one-party State resides in the President. *Zimba* states that:

> (...) the entire governmental activities under the one-party system revolve around the President. He is the real and ultimate authority upon which the entire executive, legislative, and the adjudicative functions of the State rest. He also controls the entire apparatus of the party. In a one-party State, it can fairly be said that the President is in himself the government and the entirety of the State's authority is consummated in him. He directs the operation of the army, the police, the parastatal bodies, institutions of learning, and the intelligence system. Indeed the list is [too] discouragingly long to attempt to exhaust. There could therefore be no business of government without him.[519]

After the President, the Central Committee was the most powerful body. In a multiparty system such as that in the *USA*, the executive body of a political party serves on part-time basis and does not participate in government. However, under Rwanda's one-party system members of the Central Committee served on a full-time basis and actually performed governmental functions. They were also paid from public coffers, driven in government cars and accommodated at public expense. They also received free administrative and secretarial services. The cabinet was subordinate to the Central Committee, both in terms of power and remuneration.

As during the First Republic with MDR-PARMEHUTU supremacy, exclusion of non-convinced MRND members also operated at the local level.[520] Thus, all the heads of Prefectures and Communes were

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[517]The National Congress was the supreme policy-making organ of the Party, which met once every two years. It was composed of all members of the Central Committee, all prefects, sub-prefects, burgomasters, chairmen of all mass organisations, representatives of communal councillors, secretaries and treasurers of prefectural committees. Its functions were: electing the Party President; amending, adopting and approving the Party Constitution; receiving reports of the Central Committee; examining questions submitted by the Central Committee; and presenting resolutions on political, economic, social and cultural questions. MRND Constitution, art. 14; 17; and 74.

[518]The Central Committee was composed of the President of the *Mouvement*, the Secretary General and other members appointed by the discretion of the President. Its functions were: defining and orienting the policy of the *Mouvement*, elaborating the internal general regulations of the *Mouvement* and proposing its amendment to the National Congress, controlling all the organs but the Presidency and the National Congress; ruling on constitutions of mass organisations of the *Mouvement*; drawing up the *Mouvement*'s budget; appointing candidates for the National Assembly; and executing decisions made by the National Congress. Id., art. 23.

[519]Zimba, L.S., The Zambian Bill of rights: Historical and Comparative Study of Human Rights in Commonwealth Africa, 1984, p. 181.

[520]Most of all, the previous MDR loyalists were removed from office and replaced with 'militants' of the MRND.

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MRND "militant" members. "Non-militant" MRND members could not be councillors.

Apart from political posts, party membership was made a prerequisite for holding all senior government and management positions in the parastatal sector[521], which accounted for eighty-five per cent of the economy.

2.3.5 Freedom of expression inside the party-State

Freedom of expression undoubtedly is essential for the operation of any free democratic society. *Carl Friedlick* explains that freedom of expression is "primarily concerned with a citizen's right to political self-expression, effective participation in political life, and hence constitutive of democracy itself".[522] This suggests that people in the community should be free to discuss issues of concern to them without fear of reprisal from the government. Democracy requires that all conflicting viewpoints should compete in the market place of ideas, so that the best ideas will emerge. Accountability of the rulers to the ruled is accomplished where the ruled are free to criticise the rulers for their shortcomings. In the United States of America, for instance, first amendment protection exists against the background of

> ... profound national commitment to principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.[523]

As demonstrated in section 2 5, freedom of expression was under unrelenting assault from the party and government throughout the Second Republic. Indeed, an intrinsic characteristic of a one-party State is the suppression of all ideas that conflict with those of the ruling party. Thus, freedom of expression in general cannot be realised fully in a one-party state.

The question for consideration here, therefore, is: to what extent did freedom of expression exist within the party and within Parliament, since these were the *fora* through which debates on national issues were conducted?

2.3.5.1 Freedom of speech within the central organs of the party

Since discussions within the party's central organs, such as the National Congress and the Central

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[521]Rwanda pour Tous, Memorandum de Rwanda pour Tous sur la Crise Rwandaise, 2 September 1997.

[522]Friedlick, C., Constitutional Government and Democracy, 1946, p. 146.

[523]*New York Times v Sullivan*, 376 US

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Committee, were conducted in private, one would have expected the discussions to have been much freer. The absence of publicity would ideally make the party and government leaders more tolerant of criticism of their performance.

However, in practice discussions within these organs were not robust, uninhibited and free, as the organs were completely dominated by the executive and, in particular, by the President, whose powers within the party were overwhelming. Members of the Central Committee were not elected by the people but were appointed or nominated by the President.[524] These people owed loyalty to him personally. They could, therefore, not be expected to freely criticise party and government policies without putting their positions or careers in jeopardy. All the major policy initiatives came from the President and were invariably adopted by the party organs without any critical discussions of their merits or demerits.[525] Party members who took a position different from that of the President were treated harshly and denounced as counter-revolutionaries and enemies of the nation. For example, in September 1979, two trade union leaders were expelled from the MRND-controlled *Centrale des Syndicats du Rwanda* for opposing the annual subscription required from every citizen which President *Habyarimana* had introduced without prior public debate on its merits.[526]

During the period under study, the major weakness was the failure to accommodate people who were independent minded, and especially those with leadership qualities as good as those of the party's great leader or even better. Democratization of the party, *inter alia*, requires tolerance, accommodation of dissent and criticism of the party's ideas, including the ideas of the party's leaders. The successive ruling parties failed to learn to debate within the party, accept independent-minded people and substitute loyalty for knowledge and good judgement as the foremost criteria for selecting good leaders and better party members.

Since journalists were barred from meetings of the party organs the public were deprived of information which could help them evaluate the suitability of the nations' leaders for future elections. This lack of information ensured that party and government leaders escaped public censure for whatever misdeeds may have been exposed during the closed-door meetings of the party.[527]

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[524]MRND Constitution, art. 22.

[525]For e.g. the mass organisations of the party were created by the President without prior debate in the party. These decisions were merely announced at subsequent meetings.

[526]Nsengiyaremye, The unknown tragedy, at 41.

[527]Id., at 94.

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2.3.5.2 Freedom of speech in the one-party parliament

Parliament, in whom the legislative power was vested, comprised the President and the National Assembly.[528] During the MRND era, the National Assembly consisted of 70 elected members.[529] Party militancy, as indicated above, was a prerequisite for membership of the Legislature. In addition, no one could stand for election to the National Assembly unless the Central Committee had approved his candidature.[530]

Article 66 of the one-party Constitution guaranteed the freedom of Members of Parliament to speak and vote on any issue in the Assembly. Furthermore, Article 21 of the internal regulations of the National Assembly provided for the freedom of speech and debate in the Assembly. Such freedom of speech and debate was not liable to be questioned in any court or place outside the Assembly.

In an ideal democracy Parliament plays an important role in protecting human rights, by checking abuse of power by the executive and, to some extent, by the judiciary. What degree of freedom from the executive did Members of Parliament enjoy in practice? To what extent was the executive accountable to Parliament?

Although the law did provide for freedom of speech in Parliament and the accountability of the executive to the National Assembly, this was quite difficult to accomplish in practice. First, the President, who appointed the Cabinet, as well as chaired its meetings, and possessed the real power within the party and the government, was not accountable to Parliament. He was elected directly by the people and could therefore not be unseated by a parliamentary vote of no confidence in him or his cabinet. In the next regime, the same privilege will be enjoyed by the Vice-President and Defence Minister supplanting the President, while neither will be elected.

Second, although Cabinet Ministers, being members of the National Assembly during the MRND era, were required to defend government policies, they were not the initiators of those policies. As noted above, only the Central Committee, which was also appointed and presided over by the President, could formulate government policy; the Cabinet's role was merely to implement policies decided upon by the Central Committee, which was not accountable to Parliament. Thus, Cabinet Ministers were expected to defend policies over which they had little control or influence.

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[528]Self-government Constitution, art. 72; One-party Constitution, art. 51, 1991 Constitution, art. 57.

[529]*Loi No. 18/1983, 27 Aug. 1983, art. 69, J.O., 1983, p. 501.*

[530]Id., art. 78.

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Third, the principle of collective responsibility precluded Ministers and other government officials from criticising the government in the National Assembly.[531] This considerably undermined freedom of speech in the National Assembly because a good number of its members held government jobs, like that of cabinet ministers, Secretaries of State, and members of the Central Committee[532]. In addition to reducing free speech, the appointment of the majority of the Members of Parliament to government positions gave the government an automatic majority in the Assembly. Thus, the government could pass any legislation it liked without worrying about opposition from a few backbenchers.

Fourth, since the party claimed supremacy over all institutions in the country, the National Assembly and the government were regarded as instruments or agents of the party merely. Therefore the National Assembly, being an agent, was subordinate to the Central Organs of the Party. Its role was merely to pass whatever legislation the party wanted. This was emphasised by President *Habyarimana* in a speech to the MRND National Congress on 12 November 1978, when he said that the National Assembly was not a device of opposing the *Mouvement* or its other organs but was in charge of voting laws which were supposed to govern the country according to MRND ideals.[533]

The Legislative process in practice tended to submerge Parliament. The President invariably made major legislative proposals to the National Congress, which discussed them in detail. When the proposals finally reached Parliament their enactment into law was a mere formality. As all Members of Parliament would have had the opportunity to express their views during discussion in the National Congress, they were, therefore, expected to conduct only the barest minimum of discussion on the proposals in the National Assembly. It was considered a waste of time and a betrayal of the party for any Member of Parliament to criticise the proposals of the Assembly. Members of Parliament who criticised proposed legislation and party and government policies were often attacked by President *Habyarimana* and threatened with reprisals, as was the case with *Félicien Gatabazi, Frédéric Nzamurambaho, Vincent Ruhamanya, François Muganza, Boniface Rucagu,* etc.[534]

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[531]The principle of collective responsibility is to the effect that once the cabinet has made a decision, all the members thereof, including those who opposed it behind closed doors, must support it publicly. Basomingera, A., Introduction au Droit Constitutionel, Butare: UNR, 1985-86, p. 123.

[532]Id. The Constitution did not explicitly forbid holding of a government position concurrently with a parliamentary one. Appointment of a minister as a Member of Parliament was a common occurrence in the Second Republic. Even members of the Central Committee of the MRND could be appointed members of parliament.

[533]In his speech, President *Habyarimana* said: "Le conseil National de Développement n'est pas un engin d'opposition au Mouvement ou ses autres organes. It est chargé de voter les lois devant gouverner le pays compte tenu des idéaux du Mouvement". *Discours du Président Juvénal Habyarimana, 1978, p. 93.*

[534] For details, see Ruzindana, E., La Terreur Règne, Kigali, 1988, p. 3.

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President *Habyarimana* had warned that any Member of Parliament who attacked and made wild, unfounded accusations against the party and government and their officials, would be punished. He added that as party members, Members of Parliament should at all times observe party rules and defend party policies in the house, instead of attacking them. He contended that policies and decisions made by this national council were expressions of the people's will and, thus, the wishes of the majority that should be respected. He stated that it was most unprincipled and undemocratic for any Member of Parliament, who had the chance to discuss party policy in the National Congress to somersault in the National Assembly and begin condemning a collective decision to which he was a party.[535]

It is to be noted, though, that not all Members of Parliament succumbed to intimidation by the executive. A few backbenchers had the courage to criticise the corruption and mismanagement that were prevalent in the party and government. It was such Members of Parliament who earned the ire of the President and other leaders. Thus, in a speech to Parliament in April 1980, President *Habyarimana* said, about the non-conformist Members of Parliament, that those with views other than those lying within the framework of the MRND policy should not have a seat in the "boat to development".[536]

In June 1982, a backbencher, *Nkurunziza*, called for the scrapping of the full-time Central Committee. He stated that, because the Central Committee wielded so much power, its members should be more popularly elected, preferably by party prefecture congresses. He also recommended the abolition of the posts of Members of Central Committees, Cabinet Ministers and Political Secretary at prefectural level, as they only duplicated responsibilities. He recommended that the jobs should be merged and performed by a Resident Commissioner. Parliament was sitting after President *Habyarimana* had directed it to re-examine the existing political, economic, and social structure in Rwanda. However, the Speaker told *Nkurunziza* to keep quiet and President *Habyarimana* denounced the recommendations, and ignored them completely.[537] In 1984, *Frédéric Nzamurambaho* formulated the same criticism and was dismissed from both the Ministry of Agriculture and the National Assembly.[538]

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[535]Nsengiyaremye, The unknown tragedy, at 77.

[536]Addressed to National Assembly on April 12, 1980. The MRND was labelled as *"ubwato bw'amajyambere"* (boat to development) where everybody had to sit and row to avoid sinking.

[537]Interview with Nkurunziza, 20 July 1998.

[538]AP No. 042/84 of 11 February 1984.

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The government also faced some, although very little, opposition from backbenchers in passing some laws.[539] It was because of the executive's inability to silence all opposition in Parliament that President *Habyarimana* decided to create a front bench majority of three quarters in order to guarantee that any legislation he wanted would be passed.

Some of the outspoken Members of Parliament were silenced by being appointed Ministers, Prefects or Burgomasters.[540] Others, however, paid a heavy price for their outspoken criticism of the government, by being disqualified (vetoed) from standing in subsequent parliamentary elections by the Central Committee. In the 1983 general elections, for instance, *Eliezer Niyitegeka* was vetoed from standing for the *Kibuye* constituency.[541]

Indeed the Central Committee used its power of disqualification to prevent known critics of the government from standing for election as Members of Parliament. What was even worse was that the Central Committee was not obliged to give any reason for vetoing a candidate. This inevitably led to a gross abuse of this power. A former Member of the Central Committee, *Pierre Karenzi*, noted that vetoing of candidates had not been recommended by any organ but was incorporated in the practice of the Central Committee. He said that decisions of the Central Committee in that regard were not taken independently, but were dictated by President *Habyarimana,* or were taken to please him since he always attempted to get rid of political opponents.[542]

Thus, in the 1983 general elections, the Central Committee disqualified 14 candidates. Many of those vetoed were former members of parties in the First Republic, such as the MDR-PARMEHUTU and the UNAR.[543] The Central Committee also disqualified eight candidates from contesting the 1988 general elections.[544] The possibility of being disqualified from the following elections unquestionably was a serious fetter on the freedom of expression of Members of Parliament.

All the factors discussed above served to subordinate the legislature to the executive. Because of this, the executive was not really answerable to Parliament for its conduct of government affairs.

In a plural democracy the opposition party, by criticising the shortcomings of the government, hopes

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[539]Id.

[540]Id.

[541]He was later to join the opposition in the 1991 MDR.

[542]Nsengiyaremye, The unknown tragedy, at 31.

[543] Ibid.

[544]Ibid.

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thereby to supplant the government in the good opinion of the electorate. As a result, the government is much more responsive to criticism than in a one-party State, where the government does not fear losing power, no matter how embarrassing the criticism from the legislature may be. Therefore, in the Rwandan case, criticism of the government by a few back-bench Members of Parliament, though embarrassing, was not sufficient to check the abuse of power by the government, for it did not risk losing power to an organised rival political party that could exploit its embarrassment at the next elections.

2.3.6 The hindrance of civil society

As human rights - those rights which human beings are perceived to have by virtue of their humanity and inherent dignity, and not by virtue of human law or custom - can only be fully guaranteed under a democratic government system, the object here is to know whether the majority of Rwandans had the opportunity to actually participate in the democratic process by expressing their choices.

In his analysis of state/society relations, *Migdal* has found that a stable democracy is unlikely to flourish in societies which tend to undermine the creation of civil society[545], while *Kaene* put it that "whenever civil society becomes more confident, the State rapidly loses its grip; its structural weakness and powerlessness become evident. Civil society tends to swell rapidly from below. It feeds upon whatever gains it can wrench from the State, which normally lapses into confusion and paralysis.[546]

From the variety of definitions that are available,[547] civil society can be defined as the arena between

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[545] Migdal, J.S., Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World, Princeton, N.J.: Princeton University Press, 1988, p. 247-250.

[546] Keane, J., Civil Society and the State, (ed.) Princeton, N.J.: Princeton University Press, 1988, p. 4-5.

[547] Alfred Stepan conceives civil society as "an arena where manifold social movements (...) and civic organizations from all classes (...) attempt to constitute themselves in an ensemble of arrangements so that they can express themselves and advance their interests". *Alfred Stepan, Rethinking Military Politics: Brazil and the Southern Cone, Princeton, New Jersey: Princeton University Press, 1988, p. 4.* Although Michael Bratton saw this as a neutral definition in comparison to the confrontational conception proposed by some contributors such as, for example Bayer following Gramsci and Robert Fossaert *(Bratton, M., "Beyond the State: Civil Society and Associational Life in Africa" in World Politics, vol. XLI, No. 3, April, p. 417; Bayer, J-F., "La revanche des sociétés africaines", p. 99; Fossaert, R., La société, Tome 5. Les Etats, Paris: Seuil, 1981, p. 146-147),* this basically orientational definition does not resolve the issue of the types and the location of the associations in civil society. As Naomi Chazan has remarked in this respect, groups that do not espouse "overarching societal precepts" are excluded by this type of definition, regardless of their size and professed objectives *(Naomi Chazan, "The Dynamics of Civil Society in Africa", paper presented at an International Conference on Civil Society in Africa at the Harry S. Truman Institute, Hebrew University, 5-10 January 1992, pp. 8-9. See also her "Africa Democratic Challenge" in World Policy Journal, vol. 9, No. 2, spring 1992, pp. 287-291).* Moche Lewin, on his part, defines civil society as "(...) the aggregate of networks and institutions that either exist and act independently of the State or are official organizations capable of developing their own spontaneous views on national or local issues and then impressing these views on their members, on small groups and, finally, on authorities *(Moshe Lewin, The Gorbachev*

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the family and the State where voluntary organizations and private individuals predominate because they are distinguishable from both the power structures of the State and from the mediating institutions in political society, even though all of them are still somehow interconnected; the delineation of this arena permits the members of civil society to articulate and defend interests which touch them as individuals and as members of organized groups but the sum of which is germane to the overall civic culture of their State.[548] One should expect to see flourish within this realm associations with a national appeal or agenda as opposed to a parochial one, such as labor unions; professional bodies – national bar association, teacher's union, journalists' union, writers' union, chamber of commerce and industry, etc. -; the human rights groups; religious bodies[549]; student unions and environmental movements. Unfortunately in Rwanda, the growth of voluntary associations that could be properly located within civil society suffered a mixed fortune and their actions were severely trammeled. The political authorities sponsored and then co-opted labor and a variety of civic associations including youth organizations and women's groups onto their formal prebendal and hegemonic networks. Thus, up to a point, as was the case in some other African countries, [550] there was some ground for the attribution of a corporatist tendency to the emergent political landscape, or even, for highlighting the futility of delimiting the boundaries between the State and society.

2.3.6.1 Freedom of association and assembly

The imposition of one-party rule, *de facto* or *de jure,* inevitably leads to a severe limitation of the right to assemble freely and associate with other persons in order to defend civil or political interests. Only the ruling party is allowed to exist by law and/or facts, in order to swallow up other associations in one way or the other.

Phenomenon, Berkeley: University of California Press, 1988, p. 80). Although Lewis goes further to state that these associations are not necessarily opposed to the State, the inclusion of official organizations in his definition does not resolve the problem of location of the civil society.

[548] The relevance of "civility" has been stressed in Victor Azarya, "Civil Society and Disengagement in Africa", Text of a presentation at an international conference on Civil Society in Africa at the Truman Institute, Hebrew University Jerusalem, 5-10 January 1992, p. 11-15, 22.

[549] See Chazan, N., The Dynamics of Civil Society in Africa", at 12.

[550] For these and other trends in other African countries, see, for example, Nyang'oro, J.E., and Shaw, T., (eds.), Corporatism in Africa: Comparative Analysis and Practice, Boulder and London: Westview Press, 1989; The blurring of the boundaries is especially underscored in Bayer, J-F., L'Etat en Afrique: la politique du ventre, Paris: Fayart, 1989; Lemarchand, R., "uncivil States and Civil Societies: How Illusion Became Reality", *The Journal of Modern African Studies,* vol. 30, No. 2, June 1992, pp. 177-180.

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Concerning the First Republic, something must be said about one interesting instrument through which a partial reconversion of society had been attempted: the co-operative movement associated with the *coopérative* Travail, Fidelité, Progrès (TRAFIPRO).[551] The movement had its origins in 1950, when a group of moniteurs of the *Kabgayi* region decided to pool their meager resources to set up a canteen in one of the buildings the mission had set aside for that purpose. The idea of transforming the canteen into a co-operative came from *Father Pien*, who drafted the constitution of TRAFIPRO and secured the approval of the Residency in November 1955. It was not until December 1956 that TRAFIPRO began its commercial activities, with the active collaboration of *Father Pien*, and the blessings of *Mgr Perraudin*. Judging from the circumstances of its foundation, the identity of its managers and the nature of its activities, TRAFIPRO was closely tied in with, and subject to the control of, PARMEHUTU. In his capacity as chairman of the board of directors, *Grégoire Kayibanda* became, as he himself put it, "one of its initiators and first promoters".[552]

Certainly, the harnessing of the co-operative movement to PARMEHUTU explains its popularity among the rural masses; but it also accounts for some of its shortcomings. Because so much of the money raised by the co-operative was in fact spent on the financing of political activities, its early development was slow and arduous. An even greater handicap was the continuing misuse and misappropriation of these funds by some of its PARMEHUTU appointed managers, a fact that lends considerable justification to the often-heard quip "TRAFIPFO Profitera". No one profited more from the co-operative than *Calliope Mulindahabi*, one of the PARMEHUTU leaders, during the three years that he held the post of director-general of TRAFIPRO (1960-63): hundreds of thousands of francs are said to have been diverted by *Mulindahabi* for his personal use.[553] As the funds vanished, President *Kayibanda* decided to take advantage of his trip to Europe, in October 1962, to explore with representatives of the Swiss government the possibility of bolstering the co-operative, financially and otherwise. These exploratory talks led, in 1963, to the signature of a bilateral technical assistance program providing for the extension by Switzerland of an annual loan of one million Swiss francs for the next ten years, to be spent exclusively on the development of the co-operative

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[551] Details about TRAFIPRO can be found in Lemarchand, *Rwanda and Burundi*, at 251-4.

[552] Despite or because of this, between 1956 and 1966 TRAFIPRO saw its commercial activities expand on a national scale. Its main assets in 1956 consisted of three general stores, all in the vicinity of Nyanza and Gitarama, and its membership of less than a hundred. Ten years later, a total of 27 branch stores were owned and operated by TRAFIPRO and its membership had risen to 70,000. No less impressive had been the impact of the co-operative in the social and political realms. While much remained to be done to make it a 'going concern', even at that stage TRAFIPRO could be described as one of the most imaginative and fruitful experiments attempted anywhere in sub-Saharan Africa. Lemarchand, Rwanda and Burundi, at 221.

[553] Id., at 222.

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activities; in addition, a team of experts in co-operative development were placed at the disposal of the Rwandan authorities by the Swiss government. At about the same time *Mulindahabi* handed the chairmanship of the board of directors (which he had inherited from *Kayibanda* in 1960) to *Max Niyonzima*, a long-time PARMEHUTU militant and one of the founders of the co-operative. The actual management, however, was placed in the hands of a Swiss citizen, *R. Rebord*.[554] Judging from the past record of the Swiss technical assistance program, one cannot escape the conclusion that much of Rwanda's future evolution would depend on how much external aid was funnelled into the activities of TRAFIPRO, and for how long.

But what, exactly, was TRAFIPRO? It, essentially, was a consumers' and producers' co-operative. Approximately 20% of the total production of coffee was bought and exported by TRAFIPRO. It imported a variety of consumer goods - oil, soap, salt, milk, matches, lamps, shirts, shoes, toothpaste, ballpoint pens, etc. - which were then sold at fixed prices throughout the country in each of the co-operative stores.[555]

TRAFIPRO was also an experiment in democracy, albeit a very timid one for the time. Although the board of directors functioned as a fairly autonomous body - except for the technical supervision of its European manager - the local executive committees, in theory, were directly responsible to the local assemblies. Each branch had its own assembly, composed of all the local co-operative members, and its own local committees of five, all elected by the assembly. The head of a branch was chosen from among the members of the local committee. Commenting upon the political functions of these local assemblies, the European manager of TRAFIPRO once said that they represented "a form of direct democracy".[556] Even though the comparison may seem unduly far-fetched, there can be little doubt that the semblance of democracy among the people of Rwanda during that time was due to no small extent to the structures of accountability set up via TRAFIPRO - and also to the persistent efforts of certain Swiss advisers to acquaint the TRAFIPRO cadres with the meaning and principles of direct democracy.

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[554] A man of boundless energy, properly tactful, and with a long experience of the Swiss co-operative movement as former director of the Coopératives de Neuchatel, Rebord was justly considered to have done a first rate job during his 'term of office' in Rwanda. See *Umunyamuryango*, November, 1963, p. 3.

[555] During the coffee harvest, 18 Mercedes trucks – all owned by the co-operative - collected coffee beans from individual producers at each of the 70 purchasing centers, and on their return trips to Rwanda delivered imported commodities to each of the 27 branches. *Umunyamuryango, at 4.*

[556] Rebord, 'Les acquis de la Coopérative', *Trafipro,* 4 June 1964.

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However, one can point to the continuing existence of corrupt practices among TRAFIPRO officials, the lack of requisite skills and aptitudes to run branches efficiently, and a vague sense of discouragement among certain Swiss experts when they found that their advice was frequently over-ruled at the local level. But by far the most serious difficulty was that TRAFIPRO still had to be accepted as a legitimate institution by certain politicians and in particular by northern politicians. By the *ubukonde* system in the north, some of them had become prosperous independent traders, a nascent middle-class of entrepreneurs in their respective prefectures. Hence, many took a dim view of TRAFIPRO, accusing its leaders of trying to perpetuate the paternalism and authoritarianism of the old days; some had described the co-operative as "useless for society", as "guilty of abuses and of exercising a de facto monopoly" over commercial activities; at one point certain deputies violently attacked the government for concluding a technical assistance agreement with Switzerland without first seeking the advice of the National Assembly.[557] Much of this hostility was a reflection of personal animosity against the *Gitarama* politicians, who were accused of using the co-operative for their own political ends. Thus, became associated with one of the most divisive issues in contemporary Rwanda. It was liquidated during the *Habyarimana* regime in 1983, probably because of economic problems, but also because the MRND had adopted a new formula of engulfing civil society.

Indeed the one-party Constitution made it unlawful for any one to form or attempt to form any organisation other than the *Mouvement*, or to belong to, assemble or associate with, or express an opinion or do any other thing in sympathy with such an organisation.[558]

Freedom of association was protected by Article 19, and freedom of assembly by Article 20 of the Constitution. According to these provisions, no person could be hindered in the enjoyment of his freedom of association and assembly, that is to say, his right to assemble freely and associate with other persons and, in particular, to form or belong to trade unions or other associations for the protection of his interests.

In practice, as with the other rights considered in Section two, the freedoms of association and assembly were subject to a number of limitations enacted in laws and regulations and could not be enjoyed when public order, republican form and State security were in danger.

The formation and operation of societies was regulated by the *Loi No. 06/1988* of February 12, 1988

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[557] Lemarchand, Rwanda and Burundi, 1970.

[558] One-party Constitution, art. 7.

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on organizing societies.[559] The Act required every society, unless specifically exempted from registration, to be registered.[560] The formation and operation of associations was regulated by the *Edit* of April 25, 1962 that regulated non-profit-making associations.[561] This *Edit* requires every association to be approved by an order of the Minister of Justice. According to Article 2, *"Le Ministre de la Justice peut accorder la personnalité civile à l'association sans but lucratif."* This provision gives wide discretionary power to the Minister of Justice for denying a request to be accepted from any association that the government did not like, since it empowered him to act in his absolute discretion where he considered it to be essential to refuse existence to an association. The wording of this provision makes it hard to challenge the Minister's action in court.

Freedom of association was undermined by some of the strategies for recruiting new members that the MRND had adopted over the years. In fact, prior to December 1975, freedom of association and assembly included the right to form and belong to any political party.[562] However, the right was removed under the one-party Constitution. Article 7 provided that Rwandan people were politically organised within the MRND, the only and exclusive political organisation outside of which no activity with political implications was allowed, and of which every Rwandan automatically became a member.[563] The political leaders thought that the mere declaration of a one-party State was hollow unless the Republican Constitution recognised the status of the party as paramount over all other institutions. Thus, in 1976, the MRND National Congress passed a resolution according to which the *Mouvement* was supreme and the only guarantor of public interests and, thus, that the Republican Constitution should reflect the supremacy of the *Mouvement* over other institutions operating in the Republic.[564] This direction resulted in the amendment of Article 7 of the Republican Constitution to make the party supreme over other institutions. In the process, party youths led by senior officials (including Burgomasters and Prefects and members of the Central Committee) conducted door-to-door card-checking campaigns during which those who were found to be without MRND membership

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[559]J.O., 1988, p. 437 as modified by *Loi No. 39/1988* of October 27, 1988, J.O., 1988. p., 1653.

[560]Id., art. 7.

[561]J.O., 1962, p. 153.

[562]Self-government Constitution, articles 10 & 19.

[563]Le peuple rwandais est politiquement organisé au sein du Mouvement Révolutionnaire National pour le Développement, formation politique unique hors du cadre de laquelle nulle activité politique ne peut s'exercer. Le Mouvement (...) est régit par ses status. Tout Rwandais est de plein droit membre du Mouvement (...)

[564]"Etant donné que le Mouvement (...) est supreme et est le seul garant des intérêts du peuple la Constitution de la République devrait réfleter la suprêmatie du Mouvement sur les autres institutions." *Resolutions du Congrès National du* MRND, *quoted in Sahinkuye, M., Cours de Droit Constitutionnel, Butare: Groupe Scolaire, 1991, p. 20.*

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cards were harassed.[565] As shown, this practice was also used during the First Republic in the 1960s, when people were forced to be adherents of the MDR-PARMEHUTU by signing the membership register and being issued with the membership card.[566]

The desire to centralise all power and to eliminate all centres of alternative power in a one-party state is manifested in the attempt to bring all organisations under the control of the party. Therefore, every effort was made to incorporate all associations into the party and those that refused to cede their independence to the party were subjected to harassment and even proscription.[567] The MRND was no exception to this rule. Under Article 62 of the MRND Constitution, the following groups, for example, were designated as mass organisations of the party: women, the youth, students, workers, civil servants, ... and any other organisation so designated by the Central Committee. The constitutions of such organisations had to be approved by the MRND Central Committee; and their aims, objectives and regulations had to be framed and realised within the party's objectives.[568] All Rwandan women were requested to join URAMA,[569] while JMRND[570] was created for the youth. The party was considered supreme above all institutions and therefore no other institution could exist without its blessing. Thus, Article 7 of the one-party constitution provided that the party was the supreme organisation and the guiding political force in the land and that its aims and objectives, as expressed in this constitution, provided guidelines for all persons and institutions in the Republic. Furthermore, the supremacy of the party was underscored by the MRND Constitution according to which no act of Parliament, regulation, rule, or by-law was to be enacted or passed by any state organ, if it was in conflict or inconsistent with this Constitution.[571]

Public meetings and processions were restricted by the *Ordonnance No. 17/A.P.A.J. of January 20,*

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[565]This was the case with the author's grandmother who, in 1984, was forced to sign the membership register and thus to obtain an MRND membership card after party cadres had threatened to burn her in her house. They proceeded from door to door and most Rwandans became MRND members without knowing exactly what was the status.

[566]*L'Unité*, No. 16, Sept. 1, 1962.

[567]This has been the dominant trend in One-party Regimes in Africa. Professor Nuabueze has aptly observed that, "The one-party State in Africa has tended to confirm the statement that absolute, centralised power is by its nature indivisible. It does not tolerate pockets of power within the State, even when their purpose is not political. It seeks to integrate every organisation of any public significance like trade unions, co-operative societies, farmer's associations, women's and youth associations, etc. Integration or affiliation involves control by the Party and the government. Nuabueze, B.O., Presidentialism in Commonwealth Africa, 1974, p. 249.

[568]MRND Constitution, art. 62.

[569] Meaning *Urunana rw'Abanyarwandakazi* (literally grouping of Rwandan women).

[570] Meaning *Jeunesse du Mouvement Révolutionnaire National pour le Development.*

[571]Id., art. 13; 27; 30.

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1938[572] *which* invested territorial administrators with police powers and *Loi No. 33/91* of August 5, 1991[573] regulated demonstrations and public meetings, both of which are relics of the colonial era.[574] Article 1 of the *Loi No. 33/91* requires anyone who wishes to convene a public meeting, an assembly, or to form a procession in any public place to apply for a permit from the regulating authority of the area concerned. According to Article 7, the regulating authority or his delegate are empowered to attend the meeting, assembly or procession and to suspend such assembly or public meeting as they may deem necessary for the preservation of public order.[575] Anyone who participates in a meeting or procession for which a permit has not been issued can be arrested and charged with unauthorised assembly.[576]

The government's treatment of the opposition political parties is instructive of the way the government has abused its powers to control meetings or processions.

Political parties reappeared in March 1991 as pressure groups whose main object was to overthrow the *Habyarimana* dictatorship and his MRND. They brought together businessmen, farmers, teachers, lecturers, students and lawyers. Since the main objective was to dismantle the one-party State, the government naturally felt threatened and did everything it could to frustrate the parties. Apart from using the government-controlled press to discredit the parties, the government ordered the competent authorities to deny the parties permits to hold meetings and rallies.[577] The conflict between MDR and the Burgomaster of *Bwakira* is an example. On 18 October 1993 the Burgomaster denied the MDR a permit to hold a rally in his Commune and the MDR lodged an administrative appeal to the newly appointed and pro-opposition Prefect of *Kibuye.* The Prefect held that the Burgomaster, in denying the petitioners permits to hold the meeting, had violated the petitioners' right to freedom of association and assembly and freedom of speech guaranteed by the Constitution. Although the Burgomaster had the power to reject applications for permits, he could only exercise such power in accordance with the law. There was no evidence that the granting of a permit to the MDR would have led to a breakdown of law and order. On the contrary, all previous MDR rallies had

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[572]*B. A., 1938, p. 102.*

[573]*J. O., 1991, p. 1132.*

[574]Both of these Acts are still in force in the RPF regime.

[575]The regulating authority in question is the Burgomaster if the demonstration or meeting concerns only one commune, the Prefect if they concern more than one commune, the Minister of the Interior if more than one Prefecture is involved. *Loi No. 33/91, art. 4.*

[576]Id., article 9, (2); see also article 4 of the *Instruction Ministérielle* No. 01/02 of 15 September 1978 regulating the preservation and re-establishment of order, J. O., 1986, p. 411.

[577]*Le Messager, No. 16, February 12, 1992.*

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been peaceful, despite the large number of people who attended them.[578]

This outcome could be explained by the fact that, at the time of the proceedings, *Habyarimana*'s power and popularity had been diminished greatly by the opposition's successful campaign for political pluralism. Some administrative officers, therefore, even in the government, did not fear reprisals from the completely discredited government.

2.3.6.2 The right of workers to strike

The *Habyarimana* government enacted legislation with stringent fetters on the right to strike. Owing to the denial of the right to strike by the Constitution, it was almost impossible for workers in public and semi-public sectors to organise a legal strike in Rwanda.[579] As a result all strikes that have taken place in Rwanda, although there have not been so many due to the inhibition of workers, have been illegal. The government, as indicated earlier, used various repressive methods to break up strikes: mass sacking of workers; detention of organisers; and use of heavily armed security forces, who often inflicted serious injury or death on striking workers.

The government resorted to repression of workers because it considered the workers in formal employment as a privileged group compared to the mass of the people who were either unemployed, self-employed or lived in rural areas.[580] Besides, since the government owned all the major means of production, there was perceived to be a commonality of interest between the State and workers. As President *Habyarimana* put it,

> The important division of our society is not that which may exist between trade union labour on one hand and managers and property owners on the other, but between the urban and rural areas. These are two nations we are running the danger of creating ... Now that the largest single employer is the State, this is to say the least absurd. The State controls ... the major means of production in the nation ... . It holds industrial investments, not for its own good, not merely for the good of those employed in the State enterprises, but for the benefit of Rwandans everywhere. Thus for a union to push a claim against the State is to push a claim against the people... . The gap between the Rwandan in paid employment and his brother in the villages is proportionately

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[578]Letter dated 21 October 1993, addressed to the Burgomaster of Bwakira, *T. Kabasha* by the Prefect of Kibuye, *Clément Kayishema*.

[579]Self-government Constitution, art. 32.

[580]In 1964, 74,290 persons were employed for salaries. Of this total, 41,400 persons were employed in semi-public sectors, 15,348 were central government civil servants, 10,000 in the private sector, 6,000 were estimated to be employed as domestic servants; and 1,542 persons were added to compensate for a projected underestimation of 3% of the private and semi-public sector labour force. *Nyrop, F.R., et al, Area Handbook for Rwanda, Washington DC: US Government Printing Office, p. 1978.* By 1978, these figures had almost doubled. *Mubera,* La réforme économique pour le développement national, Butare: UNR, 1978, p. *61.*

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greater than between the urban Rwandan and the expatriate.[581]

High wages were considered harmful to the economy for various reasons. First, they increase production costs thereby making locally produced goods uncompetitive, both locally and abroad. This limits the scope for industrial development through import substitution and also severely curtails the country's export potential. Second, high wages lead to high inflation, which makes prices of essential commodities unaffordable to peasants. As a result, peasants drift to the towns in search of a better life, thereby putting a strain on the already overstretched government services in urban areas.[582] Third, high wages limit job creation because employers feel compelled to adopt capital-intensive production methods in an economy in which there is an abundance of unskilled and semi-skilled labour. Lastly, high wages increase the foreign exchange, thereby forcing the government to divert scarce foreign exchange reserves from capital investments.[583]

In view of this, trade unions were not expected to play their traditional role of agitating for the improvement of conditions of service for their members. Their role under the principle of *"Démocratie Responsable"* was to improve industrial discipline, to raise productivity and to eliminate harmful work practices. As President *Habyarimana* explained:

> There can be no split between workers and employers because of the identity of their interests and where unions would be a privileged group vis-à-vis the majority of their brethren in the rural areas. The loyalty of the unions should not be sectional in terms of industry and their interests. It must be national. The aim of unions must be the development of the nation, not just their own welfare. In case they happen to exist, they can best do this by playing their role effectively as a factor of production and as an instrument of industrial discipline. To push for higher wages despite the adverse effects on the economy in an atmosphere of inflation is to negate this important role.[584]

2.3.6.3 Freedom of the press

Traditional Africa has had it that children were not allowed to ask questions as often as they wished, because questions appear to upset African fathers.[585] When these fathers came to political power, almost the same applied in respect of subjects: tolerable questioning or no questioning at all.

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[581]Translated in Nsengiyaremye, The unknown tragedy, at 66.

[582]For a discussion of the Rural-Urban migration see, Mubera, La réforme économique pour le développement national, at 63-65.

[583]Id., at 86.

[584]Translated in Nsengiyaremye, The unknown tragedy, at 67.

[585] See *Bgoya, Walter* in Building capacities for Resistance and Reconstruction in Another Development for Lesotho, Gaborone, 1989.

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Again, Africa has had it that when children washed their hands, they ate with the elders.[586] Implied in this is that children should not ask questions when they talked "promisingly big" like their domineering fathers; when they constantly kept close to their fathers, talked in their voices, mimicked their jokes and laughed uniformly with opinion leaders of the moment. In short, this is when the new submitted itself to the old; and when the old saw in the new youth the right attitude that would perpetuate the *status quo* with little or no questioning. This is what pertained in most of Africa, only to be altered rapidly by colonial oppression whose resulting contradiction gave birth to the uncompromising protests for political freedom.

But when all was done and independence was attained, the father-child attitude revisited the national home with the father keeping an eye on the child who "played with the knife" - the media of communication. In Rwanda, it will be noticed that Article 18 of the Constitution did not specifically protect press freedom. This made journalists highly vulnerable to pressure and intimidation. Freedom of the press, which was always proclaimed by the President and other leaders, only existed in theory. Besides, the leaders' proclamations contradicted *Habyarimana* who, when he became President of the Republic of Rwanda, stated that,

> Too often the only voices to be heard in "opposition" are those of a few irresponsible individuals who exploit the very privileges of democracy - freedom of the press, freedom of association, freedom to criticise - in order to deflect the government from its responsibilities to the people by creating problems of law and order ... . The government must deal firmly and promptly with the troublemakers. The country cannot afford, during these vital early years of its life to treat such people with the same degree of tolerance that may be safely allowed in a long established democracy![587]

It was argued that the implementation of human rights, which *Habyarimana* had called privileges, should be postponed because people "wanted development" as priority.[588]

In practice, the press operated under tremendous pressure. Every effort was made by the government to suppress press freedom. The two major newspapers that were allowed to inform - *Imvaho* (daily) and *La Relève* (weekly) - were owned by the government and their managing directors were appointed by the President. The only radio and television stations were owned by the government and so was the only news-gathering agency, the *Agence Rwandaise de Presse (ARP)*. The heads of Radio *Rwanda and Télévision Rwandaise (*TVR*)* were also appointed by the

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[586] Achebe, C., Things Fall Apart, London: Heinemann, 1962, p. 13.

[587] Interview with President *Habyarimana* by *Warutere P.*, Journalist at *Umoja*, February 1991.

[588] Id.

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President.[589]

Ownership of the mass media by the government meant it had control over the contents of the news to be published, as well as over who could have access to it. Within government media, there was tight self-censorship and, therefore, no big explosions of freedom of expression; not because such cases were rare, but because they were smothered within the editorial system itself. Everyone knew that they were running risks of being suspended or fired for an unpleasant truth. A hurtful truth would be referred to as an attempt to hinder the policy of "peace and national unity". Tight self-censorship would often result in media coverage which was not far from propaganda or mere statements which did not raise issues of public concern. For example, it took a long time before the media tackled the issue of corruption within the Ministry of Education, because the Minister was an influential Colonel from the North (the President's homeland), Colonel *Aloys Nsekalije*. Behind self-censorship was the ever booming threat of being thrown into the "1930", the central prison in Kigali, as was the case for journalists like *Niyitegeka* and *Rudakubana* in 1985.[590]

A lot of pressure was exerted on journalists to conform to the party and government line. Rwandan journalists who failed to conform were either suspended or fired, or detained without trial. In March 1994, for example, the Director of the *Office Rwandais d'Information* sacked *Isidore Nsengiyumva*, a journalist, for interviewing some people believed to belong to the rebels fighting against government soldiers.[591] Foreign journalists who were considered hostile were either denied accreditation or deported, as, for example, *Enos Tumusigye*, a journalist from Uganda, who was deported in 1993 without being given any reason for the action simply because he was suspected of working for the rebels. [592] *Marie France Cros*, a Belgian journalist who, since 1988, has published a series of articles in the Belgian daily *Le Soir* in which she criticised the corruption among high-ranking Rwandan officials, hidden cannabis farming in *Nyungwe* Forest, and many other issues involving Rwandan authorities, was never allowed to have a visa to return to Rwanda, as she was considered dangerous to the public image of a number of government officials.[593]

Although senior media workers (journalists and administrative staff) of the ORINFOR were appointed by the office of the President, for tight control, the government would still interfere more or less

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[589]Self-government Constitution, art. 56; 1991 Constitution, art. 44.

[590] For details about their imprisonment, see *Kinyamateka*, April 1985.

[591]Account from Isidore Nsengiyumva himself. *Interview, 12 October 1998.*

[592] Ibid.

[593] Id.

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directly to the daily running of state media (radio; television; and press). Thus, programmes that were likely to embarrass any senior government official were closely monitored. It is in this context that the programme *DUSANGIYE IJAMBO* was suspended. In fact, the programme (or its producer) would appeal to cabinet minister or heads of parastatals to come and face the people in a live phone-in programme. The most influential ministers and those whose departments were corrupt came together and imposed a ban on the programme in 1990,[594] arguing that it was likely to "bring division in the country and let government officials be punching balls of their detractors".[595]

Internal censorship would also be applied by ORINFOR administrators to defend their own bread. Thus, any journalist who were suspected of any "unfair", "unbalanced" news coverage, would be suspended for one to three months with his salary cut to one quarter during the suspension period. This was the case with *Martin Nkurunziza* who, in 1973, was put in custody for three years for having said that northerners were over-represented in government to the detriment of the rest of the country.[596] In 1993, *Isidore Nsengiyumva* was suspended for bringing more MRND members into the studio than those from MDR, but simply because the Director of ORINFOR was an MDR member appointed according to the *Arusha* Peace Agreement.[597] Thus, internal censorship was often subjective and meant to protect the administration's position.

Journalists worked in fear because the much-hated *Service Central de Renseignement* (presidential secret police) closely monitored their activities. In a presidential press conference in Kigali in 1993, *Jean Baptiste Rudahangarwa* asked why the office of the President's tight surveillance of the media was evident through a range of intimidatory techniques which involved the close monitoring of all the country's journalists through the interception of mail, indiscriminate bugging of telephones, and interrogation of reporters in the hope they would disclose their news sources, and why the private media should be "the eyes and ears of the State" as were *Imvaho* and *La Relève*. He contended that the press was entitled to enjoy press freedom and to hold opinions without interference. He argued that *Imvaho* and *La Relève* were owned by the people and that neither the press nor any organisation had a right to use them for political activities, to the exclusion of other citizens. Criticising the instructions given to journalists not to cover activities of opposition parties, he said that these instructions were "illegal, unconstitutional and discriminatory", that no one, be it a Minister, the

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[594] These were the Ministers of Education, Public Works, Justice, and Health. *Interview with Gerard Gatare, former journalist, Lusaka 25 July 1997.*

[595] Gerard Gatare, Id.

[596] Urumuli rwa Demokarasi, No. 120, p. 3.

[597] Isidore Nsengiyumva, 12 October 1998.

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President, or the Director of *Office Rwandais d'Information* was allowed by law to make pronouncements which were contrary to the Constitution and that the discrimination embodied in the instructions was not justifiable in a so-called State of law because such a State allowed a difference of opinion. He said the instructions were illegal in that they discriminated against the political actors because they held different political views from the President's ruling party. He concluded that newspapers were to be run on journalistic principles, which dictated the coverage of all newsworthy items and placement of stories, since all the people were entitled to a fair airing of their views in these newspapers.[598] Unfortunately, the President did not want to comment on this observation, and *Rudahangarwa* was later assassinated.[599]

The press was warned to adhere to the party line by President *Habyarimana* and other leaders on numerous occasions. Journalists were often instructed not to cover certain events[600] or not to interview critics of the government.[601] For example, in early 1991, the government issued a directive to TVR to the effect that only those above the rank of Governor, Director General and General Managers of companies should be allowed to appear on television. One virulent politician and frequent critic of the government, *Donat Murego*, was turned away when he went to TVR for an interview.[602]

When a crop failure resulted in widespread famine in which at least 30 people died in 1989 in the south of the country, the State-owned media did not report news of the deaths. In contrast, *Radio France Internationale* had a steady flow of news every day and *Kinyamateka had* written that the government aid had been misappropriated. All that *Radio Rwanda* did was to announce that there had been disturbances and that the public should remain calm because the government was solving the problem.[603]

The intimidation of the press was not just restricted to warnings and directives on what news should

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[598] Id.

[599]Ibid.

[600]ORINFOR, Note de Service 08/91, 10 February, 1991. In this notice, the Director of the Rwanda Office of Information (ORINFOR) instructed journalists to present non-subversive news and news which took account of the government policy of educating the people of Rwanda.

[601]Eliezer Niyitegeka, former journalist at ORINFOR, said, during a rally of the MDR in Kibuye in September 1991:"One of the most disturbing aspects of our society is the way in which the mass media has unashamedly been manipulated to the exclusive monopoly of a small clique of the leaders at the top and how the views of the ordinary citizen who wishes to constructively criticise government policies are blacked out. *Audio tape, Discours des Dirigeants du MDR, Kibuye: Meeting, September 1991. Translation by the author.*

[602]Notes from *Donat Murego*, *Goma*, January 1995.

[603]Sibomana, Gardons espoir pour le Rwanda, at 47.

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or should not be reported. On some occasions senior party and government officials seized stories prior to publication or, in the case of ORINFOR, ordered a halt to programmes already on the air, as is exemplified by the following incident. On March 15, 1993, *Kalisa*, journalist at ORINFOR, was forced out of bed late at night by agents of the *Service Central de Renseignement* who demanded to see reports of *Nyandwi*'s speech at a rally in *Ngororero*, before they were published. The agents were acting on instructions from the Director of the *Service Central de Renseignement* who wanted to read the reports written by reporter *Jean Baptiste Kalinda*, before they appeared in the paper the next day.[604] The reports were only handed back to the reporter after the Director had approved their contents.[605] This incident called forth a vigorous protest by the journalists[606] but neither the President nor the National Assembly reproached the *Service Central de Renseignement* for this disgraceful conduct.

The level of intimidation of the press was so high that the press rarely engaged in investigative journalism. The *Imvaho* was at one time described as "another government gazette" by one Member of Parliament because it only published news that pleased the government.[607]

The intimidation of the press was not only confined to the party- and government-owned media, but it also extended to printing companies and privately owned media. Printing companies were strongly discouraged from publishing books or other materials critical of the government. Even privately owned companies had to defer to the government's wishes because the government controlled the paper supply as well as the allocation of foreign exchange, which is essential for importing machinery and other primary requisites. In 1991, for example, the government ordered *PRINTERSET* to stop printing newspapers "disturbing peace and security in the country". In May, one issue of *Kanguka* was seized by agents of the *Service Central de Renseignement* before it was printed and it never appeared.[608]

Private radio and television stations were not permitted,[609] neither were independent daily papers allowed. The only independent publications allowed were the bimonthly church newspaper,

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[604]Interview with Jacques Muhirwa, former agent of the *Service Central de Renseignement, Lusaka, 29 September 1998.*

[605]Id.

[606]Id.

[607]Interview with a Member of Parliament, 15 September 1998. The MP did not want his name to be disclosed.

[608]Muhirwa, 29 September 1998.

[609]Except foreign radio broadcasts, which were not controlled. Tuning in to Radio France Internationale, British Broadcasting Corporation, Voice of America or Canal Afrique was frequent practice to know what was happening in Rwanda.

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Kinyamateka and the monthly *Dialogue*.[610] Publications by interest groups such as the *Diapason* of the students of the University of Rwanda and *Le Rwanda de demain* of Rwandan students in different overseas universities were allowed. But these had a limited circulation and usually did not cover general news.

However, the private media, in its effort to operate freely, was often overwhelmed with interference from government and security services. In the first instance, most critics of the government who were denied access to the State-owned media had their views published in the church paper, *KINYAMATEKA*. This naturally angered the President and his colleagues. On numerous occasions the paper was lambasted and threatened with proscription for publishing news embarrassing to the government. The Rwandan papers played a poignant role in disseminating the views of multiparty advocates through 1991 and at a time when the government-owned media denied them coverage.

The *Habyarimana* regime often attacked *KINYAMATEKA* for its non-conformist stand and its journalists were taken to court for sedition. In *Ministère Public v Kinyamateka*[611], *André Sibomana, Sylvestre Nkubiri, Antoine Rwagahilima,* and *Gaspard Gasasira* were charged with sedition. According to the public prosecutor, the defendants had discredited "high authorities of the country" by affirming that these authorities had accumulated goods to the detriment of the rest of the population and that they had placed themselves above laws to commit exaction. Despite their abundance of evidence, the defendants were sentenced to six months in prison. This was followed by a threat to *Sylvio Sindambiwe*, editor-in-chief of *Kinyamateka*. He received a bucket full of faeces in his face in 1983, when a suspected intelligence officer disguised as a beggar attacked him in his office.[612] He was run over by a truck a few months later. He had, in February 1982, received a letter from *Jean Baptiste Hategekimana*, agent of the *Service Central de Renseignement* warning him that he would face problems if he continued to act against the "*sécurité nationale*":

> *Tu ne devrais pas être affolé par le fait que les forces de l'ordre t'aient laissé porter atteinte à la sécurité nationale mais tu devrais en avoir peur puisque tu es devenu comme un taureau qui fait ce qu'il veut. Ceux que tu as attaqués [...] ont décidé de te rendre la pareille [...]. Personne ne pourra nous contrer dans notre objectif de sauver le pays en supprimant les indésirables.*[613]

A number of other journalists in the private media came to be acquainted with prison and repeated

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[610]Sibomana, Gardons espoir pour le Rwanda, at 44.

[611]Id., at 52.

[612] Kinyamateka, April 1983.

[613]Id. The government had incited the population to organise itself for self-defence. It will be shown later that those structures became offensive forces.

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interrogations in the *Service Central de Renseignement*. For example: *Filibert Ransoni,* a *Kinyamateka* journalist, was the first to expose the scourge of corruption and mismanagement that was making the *SOMIRWA (Société Minière du Rwanda)* sink. He was trailed through courts for months in 1983-1984, until government put pressure on his employer to sack him.[614] *Félicien Semusambi*, a self-employed journalist and writer, came to be considered by government as dangerously seditious when he published *Ubwato mu muhengeri*, a book in which he was saying that the "one-party system of the MRND was in troubled water" and that "the whole country was likely to sink".[615] In 1986, this was certainly a big "offence", as multipartyism was far from being talked about in Rwanda, as was the case in many African countries. He was subjected to a number of interrogations and was jailed in November 1986.[616] *François Gasimba*, due to his satirical book *Isiha Rusahuzi*[617] was highly acclaimed by the readership in 1987. The book was a criticism of government officials and the corrupt system. But has been exposed to tough interrogation and intimidation by agents of the *Service Central de Renseignement* ever since.[618] *Hassan Ngeze and Vincent Rwabukwisi,* two journalists who started a newspaper, *Kanguka,* a few months before the war broke out in 1990, were harassed for "working in favour of the long-deposed monarchy and for inciting the Tutsi exiles into rebellion".[619] When these journalists later split and worked separately, persecution, arrests and newspaper seizures continued. They were thought to be linked to *Valens Kajeguhakwa*, a Tutsi businessman from *Gisenyi* who had just joined the rebellion.[620]

All these instances show how government officials infringed on press freedom with impunity and that the lives of certain journalists were threatened simply because they dared to criticise the regime in place, or because of their ethnic affiliation.

Apart from journalists, some other people who had the courage to criticise government policies also suffered harassment and, in some cases, were assassinated. This was because criticism of the government was considered unpatriotic or treasonable. Although individual ministers or members of the central committee could be criticised, it was taboo to criticise the President, "the father of the

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[614] Kinyamateka, No. 132, Aug. 1984.

[615] Semusambi, F., Ubwato Mu Muhengeri, Kigali: Printerset, 1986, p. 21.

[616] Muhirwa, 29 September 1998.

[617] Gasimba, F., Isiha Rusahuzi, Kigali: Printerset, 1987.

[618] Muhirwa, 29 September 1998.

[619] Kanguka, No. 10, 1991, p. 3.

[620] Muhirwa, 29 September 1998; Kanguka, Nos. 10, 11, 12, and 13, 1991.

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nation".[621]

2.3.6.4 Academic freedom

Other groups targeted for persecution for criticising government leaders and policies were university students and academic staff.

The relationship between the UNR and the government was characterised by tension and mutual suspicion. Students and academic staff were always under close surveillance by members of the secret police who were often enrolled as students, or masqueraded as workers at the University. The government did not hesitate to clamp down on academic freedom, through closure of the UNR, expulsion or suspension of students, harassment of both students and academic staff, and appointment of pro-government vice-chancellors, packing the University councils with pro-government representatives, and censorship of student publications.

Perhaps the most spectacular example of the persecution of a dissident is that of *Alberto Basomingera*, lecturer at the Law Faculty of the National University of Rwanda. His troubles began when he posted an Amnesty International report on torture and prison conditions in Rwanda on a wall at the Law Faculty in 1984 in order to make it publicly known to his students. He was summoned for interrogation by the *Service Central de Renseignement* and was ordered "not to start again that dangerous game". In 1985, in his lecture during a class on Constitutional Law that was attended by the author and which came after the assassination of President *Tolbert* of Liberia by then Staff-Sergent *Samuel Doe*, he urged leaders of the Third World, especially those in Africa, to review their policies towards single party constitutions and reintroduce flexible mechanisms to allow peaceful change of leadership. He explained that the multiparty system of government was the surest way of avoiding coups and eliminating the disgraceful tendency of presidents to end up with bullets in their heads. He said that it was a numbing experience that successive presidents all over the Third World tended to end up with a bullet in the head. He asked if there was not something wrong somewhere if, from beneath apparent calm and submission, a sergeant rises and bombs off the head of a President to immediate popular acclaim. He contended that, if the only change in leadership was to be by death in the saddle, and especially by death of an assassin's bullet, there was not going to be

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[621]For example, in August 1989, Member of Parliament *Félicula Nyiramutarambirwa* was deliberately run over by a lorry after criticising the government for corruption in road-building contracts. Her criticism especially involved the President and the Minister of Public works, for their failure to put a road building out for tender. She also came from Butare (south) and was thought to encourage political opposition there. *See Prunier, Gérard, The Rwanda Crisis, at 89.*

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order.[622] Commenting on elections, he criticised the fact that people were forced to vote for a particular citizen and he remarked that the election of a President of the Republic by 99.98 per cent of the voters, followed by a coup d'Etat the following day, was not understandable.[623] He was summoned again and terrorised by the same *Service Central de Renseignement* about his lecture. The secret police agent told him that "this kind of lecture was arrogant, highly insulting and subversive". He was dismissed the following year. It should be mentioned that there was at least one student who notes each lecturer's comments and report to the *Service Central de Renseignement* in each class at the National University of Rwanda.

In 1993 a new lecturer from France, *Joseph Dieng*, was served with deportation orders before he started his lectureship at the university because he was communicating by telephone with "unknown people but believed to be members of the enemy", the RPF.[624] In the aftermath of this incident, *Charles Nyandwi*, the Minister of Higher Education and Scientific Research, told Parliament that, in future, lecturers appointed to the staff of the *UNR* would be screened to ensure that they reflected the aspirations of the nation and that it was necessary to re-examine the whole concept of academic freedom and autonomy in institutions of higher learning in a developing country like Rwanda which had so many priorities.[625]

Regarding the students, after the creation of the *Association Générale des Etudiants Rwandais (AGER),* which, in the 1960s, brought together Rwandan students attending different universities in the world and which followed the *Association Générale des Etudiants de l'Université Nationale du Rwanda (AGEUNR)*, the *Habyarimana* regime attempted to transform these associations into youth movements under control of the regime. But students kept their distance with regard to such interference and rather created *Le Rwanda de Demain* and *Diapason* as organs of expression for the *AGER* and *AGEUNR,* respectively. In these *fora* students expressed their views and mostly criticised the anti-democratic practice and abuse of human rights by the regime. The government's reaction often was to suspend scholarships for certain students, especially those in Belgian universities. For example, *Emmanuel Gapyisi* and *Emmanuel Bahigiki* had their scholarships suspended and had to live and study without assistance. Others, like *Romuald Mugema*, who was on holiday in Rwanda, were put in jail and the government confiscated their passports, thus denying them their freedom of

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[622]Basomingera, Introduction au Droit Constitutionel, at 42.

[623]Ibid.

[624]Interview with *Joseph Dieng* in Paris, August 1998.

[625]National Assembly Debates, 1993.

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movement, so that they were not able to pursue their studies. At the University of Rwanda, *Seth Sendashonga* and *Ezechiel Bisalinkumi* had their scholarships suspended. *Ezechiel Bisalinkumi* had published an article in the *Diapason* denouncing government favouritism in granting scholarships for studies abroad. He was threatened by agents of the *Service Central de Renseignement*, and so was *Seth Sendashonga* who had written many articles like *"Regard Critique sur le Régime de Habyarimana"* in the *Diapason*. Both students were forced into exile in Kenya in 1976.[626]

In 1981, 3 students, *Esdras Kanimba, Casimir,* and *Charles Karake* were arrested and tortured in the *Service Central de Renseignement*. They were accused of "having said seditious words" during a meeting of the General Association of Students of the National University of Rwanda at which only academic and financial problems were discussed.[627]

The University Council, working under government dictate, approved a new Disciplinary Code for students in May 1990. The Code contained severe restrictions on student demonstrations, publications and general conduct. All students had to sign an agreement promising to abide by the new code as a condition for admission.[628]

In fact, academic freedom had never been enjoyed at the National University of Rwanda since the creation of that institution in 1963. Authorities, as well as scientific and academic staff, were nominated and dismissed by political authorities.[629]

2.4 The failure of national unity

As shown in Chapter one, Rwandan ethnic groups share all cultural values despite the polarisation effected by ethnicity. To fashion a unified nation from such a polarised society has been one of the most important challenges facing Rwanda. While the primary loyalty of many Africans is to their ethnic group or tribe rather than to the nation, the consequence of the hierarchical organization of ethnic groups has been the negation of the individual, man or woman, to the profit of the ethnic community. Even if people belonging to the same group do not have the same qualities and same faults, the struggle for power has resulted in a determination to indissolubly link the destiny of each

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[626]Account given by *Ezechiel Bisalinkumi*, November 19, 1998.

[627]Interview with *Casimir Runyange*, Lusaka, July 1997.

[628]Id.

[629]See *Décret-Loi No. 2/81 of 16 January 1981 regulating the organisation of university education in Rwanda, articles 27, 29, 31, 33, 36, 37bis, 38, 40, 40bis, and 44.*

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individual to that of the ethnic group. Therefore it is difficult for many normal individuals of one ethnic group to believe that they can, together with individuals from the other ethnic group, have and defend the same ideas and the same political opinions or the same socio-professional interests. The majority of Tutsis and Hutus have been led to believe that the survival of their ethnic group or even the safeguarding of that group's interests cannot be assured by someone from the other ethnic group, unless he is a puppet. In other words, people have been led to believe that their own success is strongly dependent upon that of their group.

This psychological and cultural conditioning means that every Hutu or every Tutsi has to automatically stick with those from his or her own ethnic group for good and for evil. In the course of history, this ethnic solidarity has been used and exploited by Tutsi and Hutu leaders to mask the contradictions of interests among them and the population. That is why, in order to maintain the *status quo* in the 1950s, Tutsis who had no direct link with power were forced to fight against Hutus who wanted change, and many lives were lost.[630] Likewise, after the referendum on 15 September 1961, many innocent "Tutsi peasants without any pretension to power were forced into exile by Hutu peasants who reproached them [because] of their solidarity with the regime which had exploited Hutus for four centuries".[631]

After 1959, destitute Hutu peasants sang and danced the victory of "*Gahutu*", ignoring that a small civil and military bourgeoisie, out of cupidity and indifference towards the interests of peasant masses, was in formation. Some of them would join the militia to massacre hundreds of thousands of innocent Tutsis and Hutus for the simple fact of their belonging to the ethnic group from which most of the RPF combatants were recruited.

Even though the MRND was a truly national party in the sense that it had drawn its support from all parts of the country, it was not free from ethnic and regional rivalries. This chapter has made it evident that the incessant struggles for power and privileges within MRND were depicted in ethnic and regional terms. Of course, it was the failure to resolve these rivalries amicably within MRND that led to the formation of splinter parties by those who lost influence in the party. As indicated, *Habyarimana* was given power to create party offices and to appoint almost all the senior or party officials, from the Members of the Central Committee down to lower levels. As a result, instead of free elections for the important positions in the party and government, he favoured the system of

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630 Lemarchand, Rwanda and Burundi, 1970.

631 RDR, Plateforme Ideologique du Rassemblement pour le retour des Refugies et la Démocratie au Rwanda, Paris, August 1998. Author's translation.

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presidential appointments because "free elections allegedly engendered tribalism as candidates often canvassed for votes along ethnic and regional lines".[632] President *Habyarimana* adopted the policy of *"équilibre ethnique"* (ethnic balancing) in his appointments in order to ensure that all ethnic groups were well represented in the party hierarchy, in government and in parastatals.[633] However, not only was this policy almost a theory, but ethnic balancing was also conceived at the expense of democracy, competence and efficiency. It allowed *Habyarimana* to appoint only those loyal to him personally, rather than genuine representatives of the various ethnic groups, thereby enhancing his status at the expense of the entire nation.

Habyarimana cited the need for national unity, peace and economic development as one of the strongest justifications for introducing a one-party State in 1975.[634] He argued that, in a nation riven with divisions or conflicts, the unity of a single political party was necessary for stability and development. However, his one-party system brought nothing but one-man dictatorship and misery to the majority of the population. The so-called national unity was superficial and was enforced at the expense of democracy and human rights.

National unity and national integration, though important goals, must not necessarily be squared with political unity, that is, the forced fusion of all political parties and groups into a common mould. It can be argued that a national party aggregating diverse elements in a plural society, can perform an integrating role, but it must not, for that reason, be erected into an exclusive, monolithic organ, to which all other associations, groups and individuals must be compelled to belong on pain of suppression. The need for unity is not so compelling that the individual's freedom of choice and expression should be sacrificed, and his freedom to associate with others in the pursuit of common desires and aspirations be taken away. In a plural society, observes *Nuabueze*, "an attempt to erase tribal or racial loyalties by political fiat is futile. The ban on parties does not abolish the differences between the various social groupings in the State or the jealousies and conflicts generated thereby".[635]

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[632]Interview of President *Habyarimana* by Radio France Internationale, 19 May 1981.

[633]The policy of ethnic balancing was also adopted in education. See Sadiki, Connaissances et compétences techniques en milieu rural au Rwanda, thesis, University Johann-Wolfgang Goethe, 1997.

[634] See Minifeste et Statuts du MRND, at 13.

[635]Nuabueze, Presidentialism, at 231. As the example of the former communist countries of Eastern Europe and the Soviet Union shows, unity among the various ethnic groups and nationalities which is enforced cannot last. When communism collapsed, ethnic rivalries and nationalist feelings that had long been suppressed suddenly burst loose. This has led to the disintegration of Yugoslavia and the Soviet Union, where civil wars have been raging (i.e. between Serbia and Croatia in the former Yugoslavia; between Armenia and Azerbaijan in the former Soviet Union). In Africa there are many examples of civil wars between ethnic groups. Apart from Rwanda, where the conflict between the Hutu and Tutsi

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Normally, national unity can only be achieved through the evolutionary process of education, and through social intercourse in trade, intermarriage and other cultural and social relationships, business and professional life, a functional realignment of people cutting across tribal or racial divisions, and a shared community life generally.[636] But it is also possible to have national unity through, principally, an explicit common agreement between the concerned actors, as has been the case in South Africa.[637]

The imposition of one-party rule in Rwanda did not, and will not, end ethnic and regional antagonism. Ethnicity, like racism, simply means favouring or discriminating against a person solely on account of his ethnic group.

Like ethnicity, regionalism is a consequence of the lack of a State of law. It is also a deviation in the governance and in the social behaviour of individuals characterised fundamentally by the egocentric appropriation of political power and national resources. It shows itself in exclusion, discrimination, restriction or preference based on regional origin. As a consequence, it denies or compromises human rights and fundamental freedoms.

Unlike ethnicity, regionalism was sowed during the post-independence period. The analysis of the recent political history of Rwanda shows that the rulers surrounded themselves almost exclusively with people from their region because of the fear of democratic alternation. The object was to remain in power at all costs in order to dominate all the channels for the distribution of the limited national resources by manipulating, where necessary, the Constitution and other laws. That is why the "Second Republic" of President *Habyarimana* was initially a northern revenge over the PARMEHUTU Southerners.[638] But once it became clear that cabinet posts, economic opportunities and foreign scholarships would go first and foremost to Northerners, they began competing among themselves for the monopoly. As the President and his wife were from *Gisenyi,* they favoured the people of the *Gisenyi* prefecture over the *Ruhengeri* prefecture group. This is how the *Ruhengeri*

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has left thousands of people dead, civil war has been raging in Liberia between the Krahan and other tribes and has led to the death of thousands of people; similarly in Ethiopia thousands of people died in the civil war between the communist government of dictator Mengistu Haile Mariam (dominated by the Amhara tribe) and various ethnic groups such as the Eritreans, the Omoros and the Tigreans, etc. All these countries were undemocratic one-party States that attempted to impose national unity by force.

[636]Nuabueze, Id.

[637] Although the South African experience is a young one, it can serve as a model for Rwanda, mutatis mutandis. See Constitution of the Republic of South Africa, 1996, Government Gazette, 18 December 1996, Act No. 106.

[638]The fact was that Gisenyi and Ruhengeri prefectures were the main beneficiaries of the country's wealth to the exclusion of the rest of the country, which was considered as the south in its entirety.

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people took the second place to their *Gisenyi* neighbours and the rest of the country was neglected. For example, by mid-1990, people from Gisenyi occupied nearly one third of the eighty-five most important positions in the country, as well as almost the entire management of the army and security.[639] At the beginning of 1990, of 68 parastatals, 33 directors were from Gisenyi (19) and Ruhengeri (14).[640] According to a study of the 1979-1986 period, the disparity pertaining to studies abroad was 1.83 for Gisenyi and 1.44 for Ruhengeri, the worst-off prefecture being Kibungo, with 0.67.[641] Although ethnic conflict had not disappeared during that period, it had been outstripped by regional conflict and the situation reached was that within Gisenyi itself, Bushiru (*Habyarimana*'s region) was in confrontation with Bugoyi. It is the Bashiru who formed what is commonly called *akazu* (litterally meaning a small house or people of the same family) for effective power was within their hands.

Within the government, only Ministers from the south would be accused and dismissed for embezzlement, while those from the north, whose management was notoriously disparaged, could not be removed.[642]

Regionalism provoked rancour and agressiveness in victims of exclusion or injustice, who, in their turn, adopted the same behaviour. Thus, no leader has been concerned about public interest, whence the lack of patriotism among most public office holders.

Regionalism destroyed the country because it allowed the man in power to grow rich at the expense of the remaining citizens. Instead of turning every region's potentialities to good account and creating new resources, leaders appropriated limited available resources. That is, instead of developing the private sector, creating a prosperous civil society, and promoting education, they have stirred up quarrels for positions in the public service. In short, leaders who feel comfortable only with people of their own region cannot really solve national problems.

Indeed, it is the search for access to power which led leaders of political parties, during the multi-party interlude (June 1991-April 1994), to turn to their regions for support in the elections - which

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[639] Nsengiyaremye, The unknown tragedy, at. 71.

[640] Kinyamateka, No. 1344, April 1991, p. 10.

[641] Dialogue, No. 143 Nov.-Dec. 1990, p. 92; Reyntjens, L'Afrique des Grands Lacs en Crise, at. 34.

[642] Examples taken from Ruzindana are those of Gatabazi and Ruhamanya who were dismissed by *Habyarimana* while Nzirorera and Nsekalije remained "despite the public outcry" against their misappropriation of public funds. *Ruzindana, La Terreur Règne, Kigali, 1988, p. 3.*

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never took place - while they were unable to propose a creditable national programme. The great problem facing Rwanda was the absence of someone else who would act in the manner of and be seen as a politician of national stature and thus would be able to challenge President *Habyarimana*. It would therefore not be surprising if, after his assassination, the situation were to become worse and new leaders would simply not solve the problem of violence, and massacres in particular, and of national unity in general.

2.5 The turn of the vicious cycle

2.5.1 Theoretical end of one-party rule

In the Rwandan political tradition which the MRND Hutu regime had inherited from both *Grégoire Kayibanda* and the old Tutsi kings, the ruler needed to have followers who were his ears and eyes, people outside the official power structure who were unequivocally devoted to him and would do anything without asking questions. As seen in Chapter one, the kings had found such people among their own *Abanyiginya* clan and within their "marital" clan, the *Abega*. This, of course, with a few accompanying betrayals, conspiracies, reversals of alliance and so on, which were part of the daily experience of this court. Under the Hutu Republic, *Kayibanda* tended to rely mostly on people coming from *Gitarama* and under the *Habyarimana* regime the tendency was to create subunits according to precise, more narrowly defined geographical origin.

The Second Republic created in 1973 had initially been a northern revenge over the PARMEHUTU Southerners. But once it became clear that cabinet posts, economic opportunities and foreign scholarships would go first and foremost to Northerners, the Northeners began competing among themselves to know who would get more. The President and his wife favoured the people of *Gisenyi* prefecture over the *Ruhengeri* prefecture group led by the foreign minister, *Casimir Bizimungu,* and public works minister, *Joseph Nzirorera*. So the *Ruhengeri* people were forced to take second place to their *Gisenyi* cousins. This resulted in a sort of animosity in which the one-party State was seen more and more as the obstacle rather than the road to further development.[643]

Both Republics were characterised by lack of democracy, the rule of law and abuse of human rights with regard to the majority of the people. The *Habyarimana* regime lacked legitimacy because it was not accountable to the people. The collapse of Communism in Eastern Europe should have provided

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[643]Prunier, The Rwanda Crisis, at 86.

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inspiration for the struggle for democracy in Rwanda. Apart from the war launched by the RPF in 1990, the linkage of economic aid to good governance, democracy and respect for human right by donor countries and international financial institutions (such as the World Bank and the International Monetary Fund) should also have helped to bring about the end of one-party rule, as the Rwandan economy was on the verge of collapse. These aspects were mainly propagated by urban politicians from the opposition and by the RPF. From 1985, rumours about corruption within the regime were on the increase since the formal but declining economy could not offer the same amount of advantages as before. Political opposition to *Habyarimana* was equally on the rise. Although, officially, *Habyarimana* was re-elected President for seven years with 99.98% of the votes on December 19, 1988, domestic opposition began to be sounded louder and louder.

As in other parts of Africa in the early 1990s, several protest demonstrations were held in Rwanda in 1990. The police suppressed a strike on 4 July 1990, and a letter denouncing the one-party system was published and circulated on 1 September. Important also was the resignation from the Central Committee of the MRND, at the insistence of the Pope, of the Catholic archbishop, *Vincent Nsengiyumva*. Up to that date, the Catholic Church, and the archbishop had been traditional allies of the MRND. In April 1990 and in September of the same year, on the occasion of a visit by the Pope, the Church expressed its dissatisfaction with the political and economic situation in the country. The discontent, however, stemmed mainly from the lower echelons of the church. The leadership of both the Catholic and the Anglican churches continued to liase closely with the President and his government throughout the whole period.[644]

Whereas President *Habyarimana* considered political change feasible only within the one-party system in January 1989, one and a half years later, on 5 July 1990, he agreed to the necessity of a separation between party and State.[645] On 24 September 1990 a national expert commission was set up with the task of working out a national charter that would allow the establishment of different political parties.[646] It is difficult to ascertain the President's sincerity with respect to the reforms. However, the subsequent RPF invasion did speed up the formal process of democratization.

Initially, the expert commission's mandate ran over two years. The new political-military situation following the invasion of 1 October led to the acceptance of the multiparty system by *Habyarimana,*

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[644]Africa Rights, Rwanda: Deaths, despair and defiance, London, 1994, p. 14; Reyntjens, L'Afrique des Grands Lacs en crise, 1994.

[645]Nsengiyaremye, The unknown tragedy, at 67.

[646]Reyntjens, L'Afrique des Grands Lacs en crise, 1994.

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in a speech on 13 November, which led to the creation of new political parties. In March 1991 the MDR was publicly launched, with the explicit statement that it was the successor to the MDR-PARMEHUTU of the first President, *Grégoire Kayibanda*. About half of those who launched the "new" party originated from *Gitarama* and *Ruhengeri*, *Grégoire Kayibanda's* traditional stronghold.[647] Other smaller parties that came into existence, and that would play a role in the immediate future, were the so-called intellectuals' PSD, with some popularity in the south, and the PL, which enjoyed some support from business people and, consequently, from the Tutsi group, and the *Parti Démocrate Chrétien (*PDC*)*.[648]

These political parties were linked by the desire to oppose the *Habyarimana* regime, and there were few ideological differences.[649]

A new Constitution replaced the one-party Constitution on 10 June 1991.[650] Under this Constitution the position of Prime Minister was institutionalised to counterbalance the powers of the President. The bill of rights under the one-party Constitution, apart from a few other minor changes, was reproduced verbatim in the new Constitution and most of the provisions in the 1991 Constitution were similar to those in the one-party Constitution. For example, there is no provision for protecting minorities from discrimination and oppression, and young persons from exploitation, while all the clawback clauses have been retained.

2.5.2 Negotiations

After the adoption of the new Constitution on June 10, 1991 the President scheduled parliamentary elections for the immediate future. Only six weeks later, on 31 July 1991, the most significant "new" parties (MDR, PDC, PL and PSD) denounced the plans to hold elections so soon in a common declaration. They contended that immediate elections could benefit only the MRND, which had held power for two decades. Instead, they demanded a national convention to discuss the reform of the institutions in detail and called for democratic elections.[651]

Habyarimana rejected the idea of a national convention. Only the small PDC was ready to join a

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[647]Ibid.

[648]Nsengiyaremye, The unknown tragedy, at 69.

[649]For details of the programmes of political parties in Rwanda, see Reyntjens, L'Afrique des Grands Lacs en Crise, 1994.

[650]J.O., 1991, p. 615; Code et Lois du Rwanda, Vol. II, 1995. I, p. 21-30.

[651]Sellström and Wohlgemuth, The International Response to Conflict, 1966, p. 24.

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transitional government, but no elections were held. The other opposition parties showed their political dissatisfaction in demonstrations on 17 November 1991 and 8 January 1992.[652] This was a major setback to the presidential hopes to build a unified front of Hutu parties against the RPF. It also meant the introduction of an increasingly violent policy against any Hutu and Tutsi opposition on the part of the *Habyarimana* regime.

On 6 April 1992, after heavy national and international pressure, a transitional government was established. It included all the major opposition parties and was led by President *Habyarimana* and a Prime Minister from the opposition, *Dismas Nsengiyaremye* (MDR). However, relations between *Habyarimana* and the MRND on one hand, and the opposition parties, on the other, remained tense throughout the conflict with the RPF. The domestic opposition was vehemently accused of collaborating with the RPF and the Tutsis, who were increasingly labelled as ethnic enemies.[653]

Meanwhile, after November 1990, there was a stalemate in the military conflict between the RPF and the Rwandan army. A military solution was therefore not in sight. The conflict between the political parties and the difficulties of establishing the first real transitional government (without the RPF) in April 1992, or 18 months after the RPF invasion, also indicated the difficulties of reaching a negotiated solution. Indeed, the *Nsengiyaremye*-led government that started negotiations with the RPF on a peace treaty in *Arusha* on 10 August, 1992 was regularly obstructed by the President and the MRND. Systematically, *Habyarimana* would veto any breakthrough in negotiations that could lead to a substantial decline of MRND power. It took a lot of international pressure to make the President agree each time. Also important as underlying factors were RPF military advances, deterioration of the economy and the increased number of internally displaced persons.[654]

2.5.2.1 The preliminaries: October 1990-April 1992

Seventeen days after the RPF invasion, with mediation by Belgian and Tanzanian officials, President *Habyarimana* and President *Museveni* of Uganda agreed in *Mwanza* (Tanzania) on an OAU- and UNHCR-supervised regional conference on the refugee problem and to continue the talks their governments had been engaged in since 1988.

In *Mwanza*, *Habyarimana* and *Museveni* also agreed on direct negotiations with the RPF.

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[652]Nsengiyaremye, The unknown tragedy, at 112.

[653]Verité et Dialogue, The Rwandan Tragedy, at 13.

[654]From 80,000 in late 1990 to 350,000 in May 1992 after the Byumba offensive and to 950,000 in February 1993. Sellström and Wohlgemuth, 1966, p. 16.

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Consequently, the RPF was recognised by *Habyarimana* as a discussion partner. Also important was the continuing dialogue between *Habyarimana* and *Museveni*, despite the former's accusation against the latter's active pro-RPF involvement in the conflict in Rwanda.[655]

Until the involvement of the major domestic opposition parties in the Rwandan government on 5 April 1992, little progress, however, was achieved in the mostly-mediated talks between the government and the RPF. No fundamental agreements that would lead to a sustainable peace were signed, but only those, such as cease-fires, that would solve immediate problems.

Chronologically, cease-fires were signed and renewed after consecutive violations: on 26 October 1990 in *Gbadolite*, Zaïre, after active Belgian diplomacy; on 20 November 1990 in *Goma*, Zaïre, confirming and extending the *Gbadolite* agreement; mid-February 1991 in *Dar-es-Salaam*, Tanzania; and on 29 March 1991 in *Nsele*, Zaïre. The last-mentioned cease-fire was amended twice: on 16 September 1991 in *Gbadolite* at an OAU summit and on 12 July 1992 in *Arusha*. The latter amendment led to the creation of a so-called security zone between RPF-held territory and the rest of Rwanda.[656]

Notwithstanding the agreement at the *Goma* talks to send a 55-man OAU observer force, the *Groupe des Observateurs Militaires Neutres (*GOMN*)*, to oversee implementation of the cease-fire, only 15 officers had arrived by September 1991.[657]

2.5.2.2 The fundamentals: May 1992-August 1993

About one month after the inauguration of the new government, preliminary talks took place in *Brussels* and *Paris,* in May and June 1992, between the MDR, PSD and the PL on one hand and the RPF on the other. Agreement was reached to start peace negotiations in *Arusha*, not only to restore the *Nsele* cease-fire, but also to discuss further democratization, integration of the RPF in the government, and military reforms.[658]

Peace negotiations between the Rwandan government and the RPF started on 10 August 1992, and were greatly facilitated by Tanzania and President *Ali Hassan Mwinyi* and his Ambassador, *Ami Mpungwe*. Observers from the neighbouring countries of Burundi and Zaïre and from Belgium,

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[655]Nsengiyaremye, The unknown tragedy, at 71.

[656]The United Nations and the situation in Rwanda, UN reference paper, April 1995, p. 1.

[657]Nsengiyaremye, The unknown tragedy, at 71.

[658]Id., at 90.

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France, Germany, the United States, Senegal and the OAU would be present at the consecutive *Arusha* negotiations. The negotiations continued for one year before final agreement was reached on a total package of protocols on the principle of the creation of the rule of law, on 18 August 1992; power-sharing, the enlargement of the transitional government with the RPF and the creation of a transitional parliament, on 30 October 1992 and 9 January 1993; the reintegration of refugees and internally-dislocated persons, on 6 June 1993; and the creation of a unified national army merging the RPA and the regular forces, stipulations on commanding posts, on 3 August 1993.[659]

2.5.2.3 The rule of law

According to the protocol of 18 August 1992, Rwanda had to honour the principles of national unity, democracy, pluralism and human rights. All citizens were to enjoy the same rights and possibilities, irrespective of their ethnic, regional, religious or sexual identity. An implicit consequence was the lifting of the quota system, which, in theory, attributed power positions according to a person's ethnic identity. All refugees were to have the right to return and the multiparty system was to be one of the cornerstones of democracy. All former agreements (*Nsele*, confirmed in *Gbadolite* and *Arusha*) on the creation of an enlarged transitional government were to be honoured. The protection of human rights were to be guaranteed and supervised by a national commission.[660]

The first protocol was concluded in a short period of time. It can be characterised either as a summary of results from earlier negotiations or as a list of more general principles. The situation was different for the negotiations of the ensuing protocols. Real power distribution was then at stake.

2.5.2.4 The power-sharing and transitional institutions

The texts included stipulations on the transitional institutions (i.e. Presidency, government, parliament, and courts) and on the power distribution between and within the last three.[661]

The government was to be extended to include the RPF and be composed of 21 ministers: 5 from the MRND, including the Minister of Defence; 5 from the RPF, including the Vice-Prime Minister and Minister of the Interior; 4 from the MDR, including the Prime Minister and Minister of Finance; 3 from the PSD; 3 from the PL; and 1 from the PDC. The CDR was thus excluded. The new government, in

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[659]Protocole d'Accord entre le Gouvernment de la République du Rwanda et le Front Patriotique Rwandais, Codes et Lois du Rwanda, Vol. II, 2nd ed., 1995, p. 16.

[660]Protocol of 18 August 1992.

[661]Communiqué of 18 September 1992; Protocol of 30 October 1992; and Protocol of 9 January 1993.

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principle, was to take decisions by consensus.[662]

The transitional parliament was to be composed of eleven members each from the MRND, MDR, PSD, PL and RPF, four members from the PDC and one member each from the other recognised parties. President *Habyarimana* was to remain Head of State. However, he was to cede certain powers to the Prime Minister and the government. Presidential and parliamentary elections would be organised for the end of the period of transition. A commission was to be given the task to draft a new Constitution, which was to be the object of a referendum.[663]

Three key ingredients to the agreement need to be noted: the exclusion of the CDR; the switch from a primarily presidential system to a primarily parliamentary system in the distribution of power; and the requirement that the concurrence of at least four parties was to be required to reach a majority vote, even though the rhetoric suggested that the cabinet would try to work by consensus.

2.5.2.5 Military reforms

On June 1993, negotiators from the government and the RPF agreed on a definite cease-fire, with the inclusion of the RPF in a merged national army and in the gendarmerie. As seen, the RPF would obtain a ratio of 40% of all troops and 50% of all commanding posts. It was also specified that the enlarged transitional government would rule the country for at least one year.[664] Parliamentary elections were to be organised at the end of the transitional period.[665]

Agreement was further reached in *Kinihira* on an army of 13,000 troops and a gendarmerie of 6,000 men.[666] With regard to the army, this would imply a considerable reduction compared to the number of troops at the time: about 28,000 in the regular forces (FAR) and 20,000 in the RPA.[667] The *Armée Nationale* was to be headed by an FAR commander, the gendarmerie by an RPA commander.[668]

It was also agreed that 600 RPA men - an armoured battalion - would be allowed to see to the

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[662]See Protocole sur le Partage du Pouvoir, *in: Codes et Lois du Rwanda, Vol. I., second ed., 1995, p. 8-18.*

[663]Ibid.

[664]Later specified as a maximum of 22 months. *See Protocole sur les questions diverses et dispositions finales, art. 22, Codes et Lois du Rwanda, at 20.*

[665]Protocol of 24 June 1993.

[666]Articles of 25 July 1993.

[667]In both cases a considerable increase had been observed since 1990. UN Reconnaissance Mission to Rwanda, August, 1993.

[668]Protocol of 3 August 1993.

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protection of the RPF people in Kigali who would participate in the transitional government and administration, and to safety in the capital in general. A neutral international force or an enlarged GOMN under United Nations supervision was to be in charge of the overall security in all Rwanda and, more specifically, operate along the border with Uganda, in the demilitarised zone and in Kigali. That international force was further to be in charge of the supervision of the inauguration of the enlarged transitional government, the transitional parliament, military reforms, demobilisation and the preparation of elections. The installation of this force was a precondition for implementation of the *Arusha* agreements.[669]

2.5.2.6 The designation of the post-Arusha Prime Minister

Agreement was reached in *Kinihira,* in June 1993, to nominate *Faustin Twagiramungu* from the MDR as Prime Minister of the enlarged transitional government. We have seen how, at the moment of his designation, *Twagiramungu* was excluded from his party, since the newly-formed "Power Group" within the MDR, led by *Jean Kambanda*, had signed an agreement without the consent of the MDR arguing that the Prime Minister did not belong to their party, whereas the *Arusha* negotiators had always agreed on an MDR politician as Prime Minister.[670]

In the following period, the split within the MDR would remain, probably not to the dissatisfaction of the President, who could refer to the absence of consent within political parties in order to fail to inaugurate an enlarged transitional government in accordance with the *Arusha* agreements. Whereas the rivalry within the MDR at the start basically was a struggle between a number of persons, the dispute became more and more dominated by ethnicity. The "Power Group" increasingly used anti-Tutsi language, whereas politicians like A*ustin Twagiramungu* were open to compromise with other political and ethnic groups.

2.5.2.7 The non-implementation: August 1993-April 1994

The actual *Arusha* agreements signed on 4 August 1993 by President *Habyarimana* and RPF Chairman *Alexis Kanyarengwe* comprised the above protocols plus a series of intermediary and ad hoc agreements, such as the different cease-fire texts and the stipulations.[671]

However, the implementation soon became a problem for a number of reasons. Firstly, it depended

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[669]Ibid.

[670]Nsengiyaremye, The unknown tragedy, at 89.

[671]See Journal Officiel, 15 August 1993, p. 1264.

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on an external condition: the setting-up of an international military monitoring force since neither party trusted the other. Until then, the history of international involvement in the Rwandan crisis had been quite limited. A Neutral Military Observer Group (*NMOG*) had been set up by the OAU after the February 1992 war to monitor the application of the *Dar-es-Salaam* cease-fire agreement.[672] It consisted of about sixty African military observers but was unable to provide any political input into the situation. Then, on 23 June 1993, to facilitate the negotiations in *Arusha* and quieten the government's fears of the RPF being rearmed from Uganda, the United Nations created, by Resolution No. 846, the United Nations Uganda-Rwanda Observation Mission (*UNUROM*).[673] But after the signing of the *Arusha* agreement, the signatories turned to the United Nations to obtain the deployment of a neutral military monitoring force to ensure fair application of the agreement. On 25 September 1993, the UN Secretary-General agreed in principle and by Resolution No. 872 created the United Nations Assistance Mission to Rwanda (UNAMIR) on 5 October.[674] Then began the usual round of diplomatic consultations to find out which countries would be willing to send troops to UNAMIR. However, on 29 September, the RPF declared that it would refuse to send its battalion to Kigali for the protection of its dignitaries as long as French troops were there.[675]

Secondly, the situation within the MDR had worsened, consecutive to growing tensions between *Twagiramungu* and *Nsengiyaremye* supporters. It became difficult to determine which faction would have representatives in the government (three ministers) and the National Assembly of eleven members of parliament, or how they could share posts in the two political institutions.[676] Instead of fighting for democracy, the two camps exhausted energies trying to destabilise one another.

The Nsengiyaremye faction proved by far the most powerful considering the number of its followers, both at grassroots and in the party executive committee. An extraordinary national congress was held in Kigali where a majority of members decided to exclude *Twagiramungu* from the party "for betrayal". Some of *Twagiramungu*'s prominent supporters, like *Uwilingiyimana* and *Gasana,* were suspended as party cadres who went astray.[677] *Twagiramungu*, with the support of *Habyarimana,*

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[672]See United Nations, The United Nations and the Situation in Rwanda, 1995.

[673]*UNUROM* was very slow in getting organised and was only deployed after the signing of the *Arusha* agreement. Because of a very formal approach to border control work, its efficiency was extremely low, as *Prunier* was able to verify on the spot at both *Gatuna* and *Kagitumba* in 1994. *Prunier, The Rwanda Crisis, at 194.*

[674]Id., at 3.

[675]SWB, Radio Rwanda, 30 September 1993.

[676]For details, see Prunier, The Rwanda Crisis, at 197; Nsengiyaremye, The unknown tragedy, at 93.

[677]Rapport du Congrès National, Kabusunzu, September 1993.

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and determined to crush the giant MDR, ignored the decisions of the extraordinary congress that he had neither summoned nor attended. He continued to make declarations and to behave as the only legal national representative of MDR.[678]

The big problem was that *Twagiramungu* had become an isolated man within his party. His systematic pro-RPF standpoints had progressively alienated him from MDR supporters. He had forgotten that MDR members considered themselves heirs to the Hutu leaders of the 1959 Revolution that had chased the fathers of RPF fighters from power. That historic fact compelled MDR leaders to avoid close and confiding ties with the exiled Tutsi-based movement. In spite of the faithful backing of Premier *Uwilingiyimana*, and that of Ministers of Foreign Affairs, Education and of Information, *Twagiramungu* could not organise party rallies in Kigali or elsewhere to show off his political strength. He proved to be afraid of a meaningless attendance. The few times he attempted it, supporters were scattered by the other MDR faction.[679]

In the announced "co-habitation system", *Habyarimana* naturally preferred a politically baseless *Twagiramungu* to *Nsengiyaremye*. The future head of government, duly mentioned in the peace accord, really represented him as a scared man on the top of a baobab tree being cut down by his hunters. *Twagiramungu* no longer was the superstar of the previous year. His eloquence in political rallies had gained him considerable popularity as he galvanised crowds with his cherished theme of *"Rukokoma"* (National Conference), then in fashion in Africa. The first son-in-law of the prestigious late President *Kayibanda*, graduated from Canada, was also popular with foreign diplomats due to his fluency in French and English and easy contact with people. The MDR had elected him national chairman for his outstanding capacity to capture adherents and in recognition of his remarkable contribution to *Habyarimana's* political destabilisation. Few people wanted him for his ideas, which were often shallow, and his integrity as head of government or head of state was debatable.

Because of the divisions in the MDR, to which the MRND had contributed fuel, *Habyarimana* was assured of some unexpected RPF opponents in the transitional institutions.

Thirdly, at the end of 1993, the *Parti Libéral* also split into two factions. The Tutsi PL first Vice-chairman, *Landuald Ndasingwa,* also Minister of Labour and Social Affairs, called for the organisation of a national party convention aimed at electing definitive PL leaders. The Hutu PL chairman, *Justin Mugenzi*, also Minister of Commerce and Industry, dismissed the operation which

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[678]Kayihura, 9 June 1997.

[679]Sometimes the tension amounted to fights, and in December 1993, one person died in Nyamirambo.

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could overthrow him from the chairmanship of a party overwhelmingly dominated by the Tutsi.[680] From this disagreement were born open ethnic factions. The problem of MDR representation within the transitional institutions also arose within the PL.

Endless negotiations between rival camps of broken-up parties were followed by the UNAMIR, as mediator. Talks proved extremely difficult as their outcome had to determine whether the pro- or counter-RPF camps would be the dominant political group during the 22 months of transition.

With these negotiations, which were not planned when the peace accord was signed, RPF certainty of having the upper hand at the political chessboard vanished. The talks interested the MRND and *Habyarimana*. These opposing attitudes explain why ceremonies to set up the long-awaited transitional institutions were often postponed due to the absence of either *Habyarimana* or RPF dignitaries at the beginning of 1994.

Fourthly, when the MDR and PL factions reached compromises, the RPF blocked the installation of the broad-based transitional institutions on a mere pretext. It categorically refused to sit alongside the single CDR delegate in the parliament.[681] This denoted a lack of tolerance, since one MP of the CDR, which the Front had accused of being the "party of Hutu extremists", could have had no sensible impact on the operation of the 70 members of parliament.

Lastly, the general political climate was far from peaceful, in particular after the murder on the night of 20-21 October 1993 of the first democratically elected Hutu President of Burundi, *Melchior Ndadaye*, by Tutsi soldiers of the Burundian army. Most observers point to this event as a decisive factor in the ensuing tragedy in Rwanda. As expressed by *Linden*,

> Perhaps the single most important trigger enabling those who were determined to abort the process to win the day was ironically an assassination in Burundi on 21 October 1993, that of the new "Hutu" president, *Melchior Ndadaye*, one of the first fruits of a process of democratization of its "Tutsi" regime. Tens of thousands died in the wake of the coup and some 70,000 Burundian "Hutu" fled into southern Rwanda. The message of these events to many around *Habyarimana* was doubtless that the Tutsi would never genuinely accept (Hutu) majority rule within the context of a government of national unity. In other words, the extremists were right: *Arusha* was too much, too far, too fast.[682]

And *Lemarchand* put it forward that

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[680]Nsengiyaremye, The unknown tragedy, at 93.

[681]Id., at 94.

[682]Linden, I., The Churches and genocide: lessons from Rwanda, Svensk Missionstidskrift 83, 1995, p. 5-15.

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> *Ndadaye*'s death at the hands of an all-Tutsi army carried an immediate and powerful demonstration effect to the Hutu of Rwanda... The message came through clear and loud: "Never trust the Tutsi!" Thus, with *Ndadaye*'s death vanished what few glimmers of hope remained that *Arusha* might provide a viable forum for a political compromise with the RPF.[683]

If one adds to the above the absence of real reconciliation between conservative and reform-oriented persons and groups, the massive spread of weapons in the country and the harsh economic situation, one will better understand the difficulties in implementing the *Arusha* accords.[684]

Still, most observers thought in November 1993 that *Arusha* agreements would slowly but certainly lead to a more stable situation. Donors tried hard to give their support to a peaceful development. The *UNDP*'s preparation[685] of a "Round-Table Conference for the rehabilitation of the areas affected by the war and the social reintegration of the demobilised soldiers" is a case in point. After the formal approval on 5 October 1993 by the UN Security Council[686] to station 2,500 blue helmets in Rwanda by the end of March 1994, the first troops arrived at the end of October 1993. The final formal obstacle of the 22-month period of the transitional government had thus been overcome.

One of the first tasks for the blue helmets was to escort the 600 RPA soldiers and the designated RPF ministers and staff members to Kigali on 28 December 1993, which was called "Operation Clean Corridor". Other tasks were to guarantee the safety of the capital, the border area with Uganda and the demilitarised zone in the north. In 1994, the *UN* troops were to be in charge of the supervision of military reforms, demobilisation and demilitarisation.[687]

However, the extended transitional government, the cornerstone of the agreement on which most other activities depended, never came into being. *Agathe Uwilingiyimana* still was Rwanda's Prime Minister on the fatal day of 6 April, 1994. After the arrival of the blue helmets, the reasons for delay were internal, accentuated by the violent aftermath of the murder of *Melchior Ndadaye* in Burundi on 20 October 1993.[688]

The inauguration of a new government and parliament was planned, first for 5 January, 1994, later for 23 February and then for 24 March, but did not take place. In the eyes of the President, the

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[683]Lemarchand, R., Rwanda: The rationality of genocide, 1995.

[684]Sellström and Wohlgemuth, 1966, at 32.

[685]September 1993-April 1994.

[686]Resolution 872 (1993), reprinted in The United Nations and the Situation in Rwanda, 1995.

[687] In 1995, their attention was to be focused on the process that would lead to municipal, parliamentary and presidential elections during the last six months of the transition. Sellström and Wohlgemuth, 1966, at 32.

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different parties were too internally divided to provide a stable government that he could support. As long as no government was acknowledged, part of the opposition boycotted the installation of a new parliament.

In the meantime, in mid-February, *Jacques Booh-Booh*, the representative of the *UN* Secretary-General in Rwanda, had seriously warned of the massive spread of weapons among citizens and supporters of the militias.[689]

2.5.2.8 The manipulation of ethnicity

As noted above, the *Habyarimana* regime had attempted to establish a broad Hutu-dominated front in the early 1990s. The strategy adopted by at least part of the regime's supporters was to create a political climate that would result in political and military marginalisation of the RPF and, broadly speaking, of the whole Tutsi population and Hutu belonging to opposition parties. Political and ethnic polarisation had clearly been a strategy from the start of the conflict.[690] This was confirmed in a number of reports by different international human rights organisations.[691]

One of these reports, from March 1993, written by a group of international human rights committees, gives a detailed description of offences against human rights. The report gives an idea of the increasing extremism within and around the Presidency and the MRND.[692]

Some examples amongst many others: Simultaneous and similar patterns of violent conflicts against Tutsis and reform-minded Hutus at different places such as *Kibilira* in March 1992, *Kibilira, Kanzenze* and *Mutura* in November/December 1992 reveal a particular strategy and plan adopted by local authorities, with strong support from the highest levels. Increasing involvement of party militias, multiplication of the number of FAR soldiers by five over a sixteen-month period, escalating hostile ethnic-political propaganda by highly-placed officials against presumed opponents of the regime (Hutu and Tutsi in opposition parties and RPF), and a deliberately-created climate of insecurity and unsafety, are different indications of an organised aggressive attitude towards opponents of the

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[688]Prunier, The Rwanda Crisis, at 207.

[689]Sellström and Wohlgemuth, 1966.

[690]Reyntjens, L'Afrique des Grands Lacs en Crise, 1994.

[691]See Africa Watch, 1992, 1993; Amnesty International, 1992; Fédération Internationale des droits de l'homme, 1993; Human Rights Watch/Arms Project 1994; African Rights, 1994.

[692]Fédération Internationale des droits de l'homme, 1993.

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MRND regime.[693]

The gradual political, military and ethnic escalation benefited from the at least tacit support of the President. According to *Fédération Internationale des Droits de l'Homme, Habyarimana* was held personally liable for the death of at least 2,000 people in the period October 1990-January 1993. He never objected, for example in speeches, either to the increasingly ethnic-extremist attitude of local authorities or to the increasing involvement of party militias in the gradually widening conflict since November 1991. One of the main conclusions is that there was similarity between the different acts of violence committed by regime supporters between October 1990 and February 1993.[694]

As early as in 1993 some members of human rights groups concluded in the report that the Tutsi population had been exposed to a massacre ever since the conflict with the RPF began: "Tutsi have been killed, mutilated, harassed, made to disappear, frightened, only because of their ethnic identity." Bearing the dramatic events of April/May 1994 in mind, little doubt can exist that political manipulation of ethnicity had been on the rise in Rwanda for quite some time.[695]

The RPF attack in November 1992 caused an internal flow of displaced persons involving one out of seven Rwandans who felt forced to leave areas containing the most fertile soils in the country. The number of internally displaced persons thus increased to about 950,000 in 1993, compared to an estimated 350,000 in mid-1992. Apart from war, these persons had witnessed deliberate massacres carried out by RPF soldiers on the Hutu population.[696] After 8 February 1993, the RPF had doubled the size of its occupied territory in Rwanda, thereby infringing one of the basic elements of the cease-fire agreement with the Rwandan government, i.e. the "neutrality" of the buffer zone between "RPF territory" and the rest of Rwanda.

The RPF attacks raised massive protest in and outside the country. In Rwanda, the President and the Prime Minister denounced the latest acts of violence in a joint communiqué. The European Union, in particular Belgium, France and Germany, expressed its discontent in a similar way. France decided to increase the number of its troops by 300, to discourage the RPF march towards Kigali. *Reyntjens*[697] strongly doubts whether the RPF, after its half-successful invasion of October 1990,

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[693]Ibid. *See also Africa Watch, 1992; African Rights, 1994.*

[694]Ibid.

[695]Ibid.

[696]Desouter and Reyntjens, Les Violations des droits de l'homme par le FPR/APR, Working paper, I, June 1995.

[697]Reyntjens, L'Afrique des Grands Lacs en Crise, 1994.

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had really planned to attempt a take-over of Kigali. According to him, the February 1993 offensive should rather be seen in the same light as the one in May 1992, when the RPF launched an attack on *Byumba* to express its discontent with the lack of progress at the negotiations with the government. The strategy would have been to demonstrate its military strength and superiority to convince the other parties of the necessity of a political agreement with the Front.[698]

New talks were held between the RPF and all the parties of the government save the MRND in *Bujumbura,* from 25 February to 2 March 1993, which led to the *Dar-es-Salaam* cease-fire agreement of 9 March (after promises of the withdrawal of the French troops). This cease-fire agreement was important since it included stipulations regarding an international force, OAU or UN, to replace the French troops, a demilitarised zone and resumption of the *Arusha* talks.[699]

Hostility did not diminish after the agreements of 4 August 1993 were signed. On the contrary, Rwandan society tended to become more and more polarise in anti- and pro-RPF and Tutsi parties and groups. As described above, the unity of the MDR, the PSD and the PL was put under enormous pressure from *Habyarimana*'s supporters, who tended to equate opponents of the MRND regime with enemies of the Hutu people. Parallel events in neighbouring Burundi added to the polarisation.

The political violence that plagued Rwanda throughout 1993 and the first months of 1994 was increasingly fuelled by influential media, which agitated the Hutu population against their presumed enemies. On 8 July, 1993, *Radio-Télévision Libre des Mille Collines (*RTLMC*)* started to broadcast officially to counterbalance *Radio Muhabura of the* RPF and the official *Radio Rwanda.*[700] According to African Rights[701], "RTLMC played a key role in inciting violence against Tutsi and moderate Hutu and fervently opposed the *Arusha* Accords". Other sources indicated that the RTLMC was created to counterbalance *Radio Muhabura*, also believed to have incited people to ethnic and political hatred.[702]

The foregoing discussion illustrates the attitude of groups of supporters throughout the conflict. First, the creation of a poisoned political climate and of ethnicity had been planned since the beginning of

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[698]Ibid.

[699]See Communiqué Conjoint, 2 March 1993.

[700]Reyntjens, L'Afrique des Grands Lacs en Crise, 1994.

[701]African Rights, 1994.

[702]Reyntjens, L'Afrique des Grands Lacs en Crise, 1994.

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the conflict. Second, direct means like the use of militias, the spreading of weapons, the creation of extremist movements, political assassinations and planned massacres, as well as indirect means like the permanent climate of terror and fear and the propaganda via the media were strategically used, certainly from 1992 on. Third, the planning emanated from the highest-ranking persons in the army, the Presidential guard, the administration, etc., who had benefited from the one-party regime.[703]

All of this resulted in genocide, following the crash of the presidential aircraft in which *Habyarimana* died together with his counterpart of Burundi, *Cyprien Ntaryamira,* and all the passengers. The control tower at *Kanombe* airport had cleared for landing the aircraft returning from *Dar-es-Salaam*, Tanzania at 8:30 p.m. on April 6, 1994.[704] All the persons aboard were killed in the crash. During the same evening, after the crash of the aircraft, a selective assassination of opposition politicians, of which most were Hutus from parties opposing the MRND, began. The most apparent act was the killing of the Prime Minister, *Agathe Uwilingiyimana*, along with 10 Belgian *UN* soldiers who were assigned to protect her. The President of the Constitutional Court and the Minister of Information were other prominent immediate targets. The leadership of every opposition party was hit in a similar way.[705] The second target group for assassination, once the leading politicians had been killed, were dissenting civilians, Hutu as well as Tutsi. These included journalists, human rights activists, representatives of non-governmental groups, and civil servants.[706] Following the killing of the opposition, the massacre of Tutsis was spread out all over the country.[707] The first targets were Tutsi men and boys. Even the smallest boys were not spared. Educated Tutsi men and women were particularly at risk and the University was "cleansed".[708] Rape was used extensively. Many reports were received of women who were both tortured and raped, while others who had been wounded were also raped. Children were not spared and many Tutsi children were killed, others maimed and left with physical and psychological scars for the rest of their lives.[709]

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[703]African Rights, 1994.

[704]At the time when this dissertation was being printed, the truth about the shooting down of the aircraft had not yet been established. For speculations about the trip and the shooting down of the aircraft, see Prunier, The Rwanda Crisis, at 211-229.

[705]African Rights, 1994.

[706]African Rights lists as an example, by name and occupation, 27 journalists who were reported killed immediately after April 6. Ibid.

[707]This is documented by African Rights, 1994, prefecture by prefecture, with special accounts dealing with attacks on women and children, on churches and hospitals, etc. There is no end to the realism and horror of the accounts by the witnesses interviewed. *Ibid.*

[708]African Rights, 1994.

[709]Sellström and Wohlgemuth, 1996.

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However, RPF soldiers were also perpetrating and had perpetrated massacres against Hutus. Selective elimination of the Hutu intellectuals was reported in many testimonies. *Groupo Solidaridad* talks about the genocide of the Hutu population, which particularly targeted intellectuals, businessmen and families of soldiers.[710] Many testimonies reported the existence of mass graves in the areas controlled by the RPF in which its soldiers killed and buried hundreds of people.[711] Accounts have been given of civilians killed in many regions and of killings of war displaced persons and refugees.[712] Some organisations had even called for the "identification, prosecution, and keeping away from the future management of the country of the planners responsible for the massacres of Hutu families for their mere belonging to a political party or to the Hutu ethnic group".[713]

Desouter and *Reyntjens* affirm that the RPF committed odious crimes since October 1990 when it started the war, but its human rights violations were never subjected to serious investigations.[714] Amnesty International has responded that, for several years, the RPF closely monitored and controlled movements of foreigners in areas under its control and journalists and representatives of humanitarian organisations rarely talked to Rwandan citizens under RPF control without the presence of an RPF official.[715]

Despite the evidence that both parties were committing atrocities, the UN Security Council ordered an embargo on arms aimed against the government only.[716] The *Force Armées Rwandaises* which had actually stopped supplies in order to implement the peace accord, ran short of ammunition while the RPF was getting its supplies through Uganda.[717] The abundance and monopoly of bombs and rockets constitute one of the main explanations for the RPF's relentless advance and victory.

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[710](Letter to) "Imo. Sr. D. Boutros, Secretario General de la ONU", Madrid, 30 May 1994 by Grupo "Solidaridad y Ayuda Humanitaria a Rwanda".

[711]Detailed information on the populations massacred by RPF in Byumba and Ruhengeri can be found in *Solidaire-Rwanda/Lifatanya, Le non-dit sur les massacres au Rwanda*, November 1994; *Ligue des Réfugiés Rwandais pour les Droits de l'Homme (LIRDHO), Part I., December 1994 & Part II, April 1995.*

[712]Human Rights Watch/Africa, 1994; African Rights, 1994.

[713]See Nzabahimana, F., 'Rwanda or the Political Emergency', *in CRAD, 29 AUGUST 1994. This report gives a list of priests, religious, human rights activists, teachers, journalists ... killed by the* RPF. *See also Dialogue No. 177, August-September, 1994.*

[714]Desouter and Reyntjens, Les Violations des droits de l'homme par le FPR/APR, 1995.

[715]Amnesty International, Rwanda: Reports of killings and abductions by the Rwandan Patriotic Army, April-August 1994, 20 October 1994.

[716]Reprinted in Nsengiyaremye, The unknown tragedy, at 100.

[717]Ibid.

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Although the new government was to present itself as a return to the *Arusha* agreement which was a complement to the 1991 Constitution, it would adopt stratagems to hold the power in monopoly. Human rights would simply not be given effect, just as they had been violated during the Hutu regimes.

2.6 Human rights in the books and in action

This section is intended to analyse the human rights provisions in the Constitution, their limitations and the extent to which they have been respected or violated in practice.

A bill of rights was incorporated for the first time in Rwandan history in the self-government Constitution in 1962. It was reproduced almost verbatim in the 1978 one-party Constitution and in the 1991 Constitution. The form and content of most of the provisions, therefore, have remained almost the same. For convenience, unless otherwise stated, most of the articles cited are those found in the 1978 Constitution.

2.6.1 Form of the guarantee of rights

The bill of rights incorporated in the self-government Constitution was modelled on the Senegalese Constitution of 1963[718], which, in turn, was based on the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. The Senegalese model of rights was also incorporated in the Individual Constitutions of several other African countries such as Mauritania, Gabon, Chad, Sierra-Leone, and Guinea. It was about the "*droits classiques*", the enumeration, without details of most first generation rights.

It is the author's contention that the bill of rights is predicated on the common law. An eminent African constitutional scholar, *Nuabueze*, argues that the bill of rights:

> ... created no rights *de novo* but declared and preserved already existing rights ... . This is borne out by the negative phraseology of some of the provisions. To say that no person shall be deprived of his personal liberty clearly presupposes an existing right, for it would be an abuse of language to talk of "depriving" a person of a right which he does not have.[719]

It follows therefore that, if the bill of rights is suspended or abolished after, say, a military coup, these rights will continue operating as against the executive according to the common law of the country.

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[718]Constitution de la République du Sénégal, 1961, Act No. 18/61 of 1961.

[719]Nuabueze, Constitutionalism in the emergent States, 1973, p. 41.

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However, the Legislature will be freed from the restrictions in its legislative competence imposed by the bill of rights.[720]

Although human rights can be limited by the rights of others and by the reasonable "needs of the State to perform its public duties for the common good"[721], public international law is of considerable importance as regards the non-derogability of a number of rights. Under customary international law, no State may suspend or violate the right to life; freedom from torture or cruel, inhuman, or degrading treatment or punishment, and from medical or scientific experimentation; the right not to be held in slavery or involuntary servitude; and the right not to be subjected to retroactive criminal penalties.[722]

Although not mentioned in the Rwandan Constitution, it is noteworthy that the bill of rights is not exhaustive of the rights protected by the common law, rights which, in spite of their exclusion, continue to be enjoyed by the individual.[723] In South Africa, this is expressly stipulated in Section 39 (3) of the 1996 Constitution, which provides that "the bill of rights does deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill".[724] In the United States of America, the ninth Amendment to the Constitution provides that "the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people". However, the omission of such a precision in the Rwandan Constitution is dangerous, mostly since, as analysed in this chapter, Rwandan courts have failed to interpret human rights provision in favour of the individual, thus supporting the State's violation.

The bill of rights in the self-government Constitution contained a general declaration of the rights every person in Rwanda was entitled to regardless of race, place of origin, clan group, political opinions, religion, colour or sex.[725] Moreover, Article 13 provided that the rights and freedoms contained in the Universal Declaration of Human Rights were guaranteed to all citizens. The rights

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[720] Karen, A., Rights and the People, Working Paper, Nairobi, 1993, p. 14.

[721]Higgins, Derogations under Human Rights Treaties', 1976/77, XLVIII BYIL 281, at 283, *quoted by Erasmus, G., "Limitation and Suspension", in: Rights and Constitutionalism-The New South African Legal Order, Cape Town: Juta and Co, Ltd, 1994, p. 629.*

[722]Siracusa Principle 69, cited by Erasmus, Ibid.

[723]Ibid.

[724]Constitution of the Republic of South Africa, 1996, Act No. 106. Moreover, South African Courts are empowered to apply, or if necessary develop, the common law to the extent that legislation does give effect to the guaranteed rights. *Id., section 8, (3), a.*

[725]Self-government Constitution, *Titre II.*

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may be divided into three categories: a) life, liberty, security of the person and the protection of the law; b) freedom of conscience, expression, association and assembly; and c) protection of the privacy of one's home and other property and from deprivation of property without compensation.

The most striking fact is that, by providing that "their exercise may be determined by laws and regulations"[726], Article 13 subjected the enjoyment of all these rights to the Acts of Parliament and rules and regulations of the Executive. The exceptional power vested in the legislature and the executive made the constitutional guarantee meaningless. Furthermore, the enjoyment of these rights and freedoms was subject to limitations: respect for the rights and freedoms of others, and public order.[727] In addition to these two general limitations which applied to all the guaranteed rights, most of the protected rights contained numerous derogation clauses. These included the right to protection from deprivation of property, freedom of conscience, freedom of expression, equal protection of the law, freedom of assembly and association, freedom of movement and freedom from discrimination. The format adopted was that the right was first protected in broad terms. A succeeding provision then referred to "the law" which outlined circumstances in which that right might be derogable from. In many instances the qualifications for the rights were so wide-ranging as to negate the right or render it meaningless. In fact, the derogation clauses allowed the Legislature to enact laws that might result in the taking away some of the substance of rights granted. The only fetter placed on the Legislature was that such laws had to be "reasonably required in the interests of defence, public safety or public order".[728]

A significant limitation on the enjoyment of human rights was that most of the rights guaranteed might be abridged when an emergency declaration was in force due to "threats to public security and public order".[729] As the constitutions referred to the rules and regulations for the enjoyment of most of the rights guaranteed, the *Décret* of 20 October 1959[730], still in force, allowed the suspension of all the rights except the right to life, protection from slavery or forced labour, protection from torture and inhuman treatment, and equal protection of the law, when an emergency declaration was in force or

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[726]Article 13 reads: "*Leur exercice peut être réglé par les lois et règlements*".

[727]Self-government Constitution, article 14. The article begins with the word: *"chacun"* , which means that it is recognised and declared that every person in Rwanda has been and shall continue to be entitled to the fundamental rights and freedoms of the individual.

[728] See for examples Instruction Ministérielle No. ½ of 15 September 1978, J.O., 1986, p. 411; Loi No. 33/91 of 5 August 1991, J.O., 1991, p. 1132; Décret of 7 December 1960, B.O.R.U., 1960, p. 8.

[729]self-government Constitution, art. 14. Read together with Decree of 20 October 1959 on the state of emergency, B.O., 1959, p. 2412; Codes et Lois du Rwanda, Vol. I., second edition, 1995, p. 487.

[730]Ibid.

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when the country was at war. We will see in Section three how this *décret* was abused for political purposes.

As regards the conformity of laws to the Constitution, Article 103 of the self-government Constitution provided for the establishment of a Constitutional Court, which, according to Article 57, could give a verdict on the constitutionality of bills within eight days or, in case of emergency, within four days. A bill found unconstitutional was to be returned to the National Assembly for reconsideration. In this regard, the National Assembly had to amend the bill to avoid a new censure.[731] In practice, however, members of parliament allegedly defending the interests of their ruling party frustrated Constitutional Court judges. For example, members of parliament attacked and denigrated judges, arguing that "they do not put all their heart into serving the party". The following excerpt from a National Assembly debate in 1966 is self-explanatory:

> Le personnel ne sert pas de tout coeur le parti. Voyez des gens comme *Munyangaju Aloys*, c'est un ancien de l'APROSOMA. Il n'est pas un PARMEHUTU convaincu. *Ntashamaje*, c'est un *mututsi*; *Appolinaire* également. Ce n'est pas étonnant que [le personnel] ne semble pas montrer tout son sérieux.[732]

This suggests that a Constitutional Court composed of "non-PARMEHUTU" or simply "non-Hutu" judges had no power to persuade the National Assembly to amend an unconstitutional bill. Moreover, declaring an Act of Parliament unconstitutional amounted to attacking and somehow threatening the government from which most of the laws originated. As a result of this distrust, a number of bills that were passed and promulgated did not conform to the observations of the Constitutional Court. For example, the National Assembly refused to consider the Constitutional Court's ruling on the unconstitutionality of the Bill on National Education passed on 21 April 1966. The bill had been declared unconstitutional because it provided, *inter alia,* that religious teachers should receive only 80% of the salary paid to non-religious teachers of the same category and competence; and that the property of private schools should be expropriated without compensation. [733] The bill was never returned to the Constitutional Court to check whether the National Assembly had considered its observations, and it was passed without modification, as were many others that

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[731] Décret of 7 December 1960, B.O.R.U., 1960, p. 8.

[732]Meaning: The staff does not serve the party with their heart. Look at people like Aloys Munyangaju, he is a former member of APROSOMA. He is not a convinced PARMEHUTU. Antoine Ntashamaje is Tutsi, as well as Appolinaire Nsengiyumva. It is not surprising that the Court does not seem to take a serious attitude. National Assembly Debate, Doc. No. 318 (1966-67), session of 7 September 1967, p. 19. Id., at 433.

[733]For details about this case, see Reyntjens, Pouvoir et droit au Rwanda, at 432.

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followed.[734]

Another example pertains to the ruling related to Article 325 of the preliminary title of the civil code.[735] According to that provision, "*la reconnaissance de l'enfant par l'un des conjoints n'a d'effets qu'à l'égard de celui qui l'a faite. Le consentement de l'autre époux est obligatoire, sauf en cas de séparation des biens*". The Constitutional Court ruled it unconstitutional, arguing that it subjected the legal recognition of a natural child by a spouse to the consent of his partner, while the meaning of civil liberty was "a liberty guaranteed to an individual against the other individual".[736] The National Assembly did not consider this ruling and the bill passed the second reading, the argument being that only the lawful family was protected by the State, whence the violated provision did not concern natural children.[737] In this regard, this law excluding natural children from the protection of the law was a violation of the principle of equality before the law and thus unconstitutional. However, the Constitutional Court ruled it constitutional. Observers affirm that the judges had received an order to do so.[738]

In reading the Rwandan Constitution, the reader would have the impression that Rwandan people opted for separation of powers and a checks-and-balances system. He or she would think that the idea of democracy, constitutionalism and judicial review, which provide the substance of constitutional democracy, have gained strong ground. Arguably, the doctrine of separation of State power among the three branches of government implies checks and balances of one over the other and judicial review is one of the devices for such a system. Judicial review is a means to check legislative encroachments and to control the actions of executive government, so that it should not go beyond its constitutional limitations. In other words, "judicial review helps a nation as a whole govern itself and direct its progress in the light of constitutional principles".[739] The Rwandan Constitution granted such rights to the courts. But the fact that the National Assembly assumed the

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[734] In his study, Reyntjens counts only four bills referred to the Constitutional Court from 1962 to 1973: cases no. 19/11.02 of 22/5/1963 (law on Rwandan citizenship); No. 42/11.02 of 55/5/1964 (law on the head tax); No. 73/11.02 of 7/8/1965 (law on elections); and No. 78/10.02 of 26/4/1966 (law on national education). *Id., at 431.* From 1973 to 1989, Karake counts only 2: the law on cattle tax and that on the value added tax. *Karake, K., Les arrêts de la Cour Constitutionnelle Rwandaise, Butare: UNR, 1990.*

[735] Law No. 21/1988 of 27 October 1988, J.O., 1989, p. 9 (Codes et Lois du Rwanda, Vol. I, 2nd ed., 1995, p. 185).

[736] "(...) une liberté garantie au profit d'un particulier à l'encontre d'un autre particulier". *Quoted in* Ntampaka, C., 'Problematique de la Justice au Rwanda', *Dialogue, No. 186, Oct-Nov. 1995, p. 5.*

[737] Id.

[738] Ibid.

[739] Jembere, A., 'The Making of Constitution in Ethiopia: The Centralization and Decentralization of the Administration', New Trends in Ethiopan Studies, papers of the 12th International Conference of Ethiopian Studies, 1944, Vol. 11, p. 77.

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right to pass bills and ignore the constitutional court's rulings placed the issue of constitutional rights in the hands of a partisan body dictated by the wishes of the "majority", whereas "constitutional guarantees are provided to protect individuals and minorities from the reaches of political expedience and majoritarian whims and fancies".[740]

2.6.2 No system for the protection of ethnic minorities

Despite the terrible lessons to be learned from the country's recent history, the State has failed to make provisions in the Constitution and in the laws for the protection of minorities.

In practice, no effective system for the prevention of ethnically motivated massacres has been set up. There have been no real police in the overpopulated rural areas; at most, there have been one or two local officials, who would be incapable of facing up to a rampaging mob. Nor has there been any effective warning system within reach of ethnic minorities themselves or their representatives. In fact, everything has been left to the diligence of local government officials who, as will be seen, have often been accomplices in the massacres or even instigated them. For example, the political and administrative commission which investigated the disturbances in the Prefectures of *Gisenyi, Ruhengeri* and *Kibuye* even noted that the region's telephone system had suddenly "broken down" at the time of the events of January 1993, and had "curiously" become operational again without any need for repairs. A number of Tutsis were massacred in those regions.[741]

2.6.3 Theory and practice of individual rights and freedoms specifically protected

Dlamini argues that "the protection of human rights is indispensable for democratic stability". The provision for the protection of fundamental rights in a constitution, coupled with an independent and fearless judiciary as a watchdog, constitutes the essential ingredient that makes democracy work.[742] Although the provision for the protection of human rights in a constitution is not the only way to ensure these rights,[743] it has been the one followed by most independent African States, including Rwanda. By analysing the Rwandan bill of rights and the practice of the guaranteed individual rights and freedoms, this sub-section shows the ineffectiveness of the bill of rights in Rwanda and the lack of commitment to it by Rwandan authorities. Although there have been no thorough statistics giving

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[740] Ibid.

[741] UN, The United Nations and Rwanda, 1993-1996, Document 20, at 210.

[742] Dlamini, CRM. Human Rights in Africa. Which Way South Africa? Durban: Butterworths, 1995, p. 43.

[743] Britain does not have a bill of rights, but effectively protects human rights by virtue of her long-established tradition which is absent in the African context. See also the alternative ways of protecting human rights in Chapter three.

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cause for an assessment of trends over time since 1962 and ethnic differences in treatment in most cases dealt with, accessible facts will be used to show that the Rwandan State has failed to protect human rights. The issue concerning the judiciary is analysed in a separate section.

2.6.3.1 Protection of the right to life

Rwanda is party to the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and the Convention on the Rights of the Child.[744] The provisions of these instruments form part of domestic law and take precedence in the event of conflict with another provision of domestic law.

Article 13 of the self-government Constitution guaranteed to all citizens "fundamental liberties as defined in the Universal Declaration of Human Rights" but subjected their enjoyment to provisions of laws and regulations. Moreover, it provided that no person should be deprived of his life intentionally, save in execution of the sentence of a court in respect of a criminal offence under the law in force in Rwanda of which he had been convicted.

However, these provisions have not been given effect in practice because of the scant regard shown by leaders who have not been fully committed to the bill of rights as shown by the situation before and during the genocide.

2.6.3.1.1 Pre-genocide denials

In addition to the death penalty and death in war, death was permissible where reasonable force was used to defend any person from violence or to defend property[745], or to prevent the commission by that person of a criminal offence.[746] Apart from the deprivation of the right to life by the 1994 genocide, war crimes and crimes against humanity, the death penalty has been imposed for treason[747], plotting against State security[748], murder[749], manslaughter[750], and armed robbery[751]. The

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[744] United Nations, The United Nations and the situation in Rwanda 1993-1996, New York: United Nations, 1996, p. 205.
[745]Penal Code, articles 337 and 338.

[746]Id., article 338, 2.

[747]Id., art. 151, 154, 158, 159.

[748]Id., art. 164, 168, 171, 176.

[749]Id., art. 238, 240, 313, 315, 317.

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courts have frequently imposed the death penalty and executions were conducted quite often.[752]

In practice, the right to life has been widely violated since independence, by the successive regimes. On many occasions Presidents themselves were involved in murdering innocent people. As early as 21 December 1962, when Tutsi refugees attacked Rwanda in order to restore the Tutsi regime, the national police made roundups in which hundreds of Tutsis and some Hutus were arrested and summarily executed. President *Kayibanda* dispatched his Ministers in prefectures with mandates "to organise civilian self-defence groups to counter possible attempts at internal subversion."[753] The killings began on December 23, in the prefecture of *Gikongoro* at the instigation of the local prefect, *André Nkeramugaba*. Addressing an improvised meeting of burgomasters and PARMEHUTU propagandists, *Nkeramugaba* is reported to have said: "We are expected to defend ourselves. The only way to go about it is to paralyse the Tutsis. How? They must be killed." This was the signal for the slaughter. Armed with clubs, pangas and spears, the Hutus methodically began to massacre the Tutsis. In that prefecture, an estimated 5,000 Tutsis were massacred.[754] Soon the contagion spread to other areas, accompanied by wanton cruelty.[755] In one locality more than one hundred Tutsi women and children were reported to have voluntarily drowned themselves in the *Nyabarongo* River in a suicidal attempt to escape the clutches of attacking mobs of Hutus. Popular participation in violence created a kind of collective catharsis through which years of pent-up hatred suddenly seemed to find an outlet. Such atrocities would recur in the 1994 genocide, preceded, accompanied, and followed by atrocities committed by the Tutsi army on the Hutu population.

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[750]Id., art. 324.

[751]Id., art. 400, 403, 411.

[752]For example, in 1979, 15 people were sentenced to death for criminal offences (Karema, A., Death in emerging states, Working paper, Dodoma, 1986, p. 27); in 1985, 13 people were sentenced to death, 5 for treason and the rest either for murder or armed robbery (Id.).

[753] Reyntjens, Pouvoir et droit au Rwanda, at 465.

[754] That the reprisals should have been primarily in this area is not accidental. Besides having a very high density of Tutsis, the Gikongoro prefecture was the core area of the Tutsi opposition, a fact that is not altogether unnatural if one considers that it also contained within its boundaries the former royal residence of Nyanza. In an effort to weaken the Tutsi opposition, the Rwanda government had decided to break the former prefecture of Nyanza into two separate administrative units, one of which became known as the Gikongoro prefecture. But this did not prevent the Tutsis of Gikongoro from continually and defiantly expressing their hopes of returning to power. Under the circumstances one can better understand why the Hutu population should have been driven to such extremities.

[755] One missionary later recounted how a group of Hutu 'hacked the breasts off a Tutsi woman, and as she lay dying forced the dismembered parts down the throats of her children, before her eyes'. *As reported by Claire Sterling in "Chou-en-Lai and the Watutsi", Reporter, 12 March, 1964.* Robert Conley, of the *New York Times* wrote that on one Tutsi hilltop the massacre went on all night, prompting one missionary to say –'still stammering from shock': it was beyond belief - screams, they went on hour after hour'. *New York Times, 9 February 1964.*

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Meanwhile, in 1974, upon the overthrow of President *Kayibanda*, President *Habyarimana* enacted a *décret-loi*[756] creating a martial court for crimes against State security. President *Kayibanda* and seven other dignitaries of his regime were sentenced to death.[757] Upon some internal disapproving murmurs and international pressure, President *Habyarimana* enacted an order[758] commuting the death sentence to one of life imprisonment. However, President *Kayibanda* was denied food and died on 15 December 1976. The other dignitaries also died in detention, including the former Minister for International Cooperation, *Augustin Munyaneza*, whose skull was crushed with a hammer.[759] Between 1974 and 1977 the *Habyarimana* security chief, *Théoneste Lizinde*, and his colleagues had killed fifty-six people, mostly former dignitaries of the *Kayibanda* regime, but also lawyers and businessmen whom they disliked for one reason or another.[760]

On some occasions the gendarmerie broke up demonstrations and strikes, using excessive force by which people lost their lives. The gendarmerie also killed unarmed suspects and even innocent people on the streets. For example, in April 1988, during a demonstration of students from the University of Rwanda, the gendarmerie opened fire and killed one student and wounded five more. On June 27, 1993, during a demonstration by members of opposition parties, the gendarmerie fired into a minibus that was rushing a pregnant woman to *Centre Hospitalier de* Kigali, killing two people and critically injuring two others.[761]

One reason for the prevalence of the indiscriminate killings is that the Rwandan police were not well trained in either the control of crowds or the use of arms. Nor were they equipped with appropriate non-lethal crowd control equipment. As a consequence, attempts by police to control strikes and demonstrations usually culminated in many unnecessary deaths and serious injuries of unarmed civilians.[762] For example, in November 1993, during demonstrations organised by opposition political parties, at least 20 protesters were killed by the security forces composed of army soldiers and gendarmes armed with automatic weapons and live ammunition which they fired into the crowd

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[756]*Décret-Loi* of 9 June 1974, *Journal Officiel* 1974, p., 397.

[757]Jugement of 29 June 1974.

[758]*Arrêté Présidentiel* of 19 July 1974, *Journal Officiel* 1974, p., 508.

[759]Interview with Irené Kayibanda, May 1986.

[760]Amnesty International, No. 118, December 1985.

[761]Many other examples can be found in *Umurangi*, 28 October 1993.

[762]Ibid.

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indiscriminately.[763]

A number of suspects died in police custody under suspicious circumstances, often after brutal interrogations. The following are examples of suspects who died in police custody: An assault suspect, *Fulgence Karangwa* was found hanging in a police cell in *Muhima,* after interrogation, in August 1993. His relatives claimed that he had been tortured by the gendarmerie.[764] Two months later another suspect, *Vincent Mugwiza*, died at the same police station, after being kicked, punched and having his testicles smashed during interrogation.[765] In mid February 1994, 2 suspects held in connection with a robbery died while in police custody after brutal interrogation. The first suspect died in hospital while the second suspect was found dead in his cell.[766]

With regard to convicted prisoners, many people have died in Rwandan prisons. Some of the prisoners died from natural causes exacerbated by inhuman conditions in prisons, while others were killed by prison warders.[767]

In most of these cases no serious investigations were conducted by the *Ministère Public* to ascertain whether the police force was culpable. On those rare occasions when investigations were conducted, usually after denunciation, they were not vigorously pursued or thorough and the results of the investigations were not always published. As a result, few policemen were ever convicted of murder or manslaughter.[768]

In spite of numerous complaints by the public about police brutality, little has been done to purge the police of bad elements and to institute public accountability. It was the lack of accountability of the police, and lack of concern on the part of the political authorities that allowed this kind of unacceptable behavior by the police.

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[763]Ibid.

[764]Lii Rocher, Rwanda: Visit report, 25 January 1996.

[765]Id.

[766]Kanguka, February 1994.

[767]Amnesty International, UA 134/95, 9 June 1995.

[768]Lii Rocher, Rwanda: Visit report, 25 January 1996.

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2.6.3.1.2 The genocide

In the thirteen weeks after April 6, 1994 that followed the crash of the presidential aircraft, at least half a million people perished in the Rwandan genocide; perhaps as many as three quarters of the Tutsi population. At the same time, thousands of Hutus were slain because they opposed the killing campaign and the forces directing it.

The killers struck with a speed and devastation that suggested an aberrant force of nature, "a people gone mad," said some observers. "Another cycle of tribal violence," said others. We have seen that the nation of some seven million people encompassed three ethnic groups. The *Twas* were so few as to play no political role, leaving only Hutus and Tutsis to face each other without intermediaries. The Hutus, vastly superior in number, remembered past years of oppressive Tutsi rule, and many of them not only resented but also feared the minority. The government, run by Hutus, was at war with the RPF, rebels who were predominantly Tutsis. In addition, Rwanda was one of the poorest nations in the world and growing poorer, with too little land for its many people and falling prices for its products on the world market. Food production had diminished because of drought and the disruptions of war: it was estimated that 800,000 people would need food aid to survive in 1994.

But this genocide was not an uncontrollable outburst of rage by a people consumed by "ancient tribal hatreds." Nor was it the preordained result of the impersonal forces of poverty and over-population.

This genocide resulted from the deliberate choice of a modern elite to foster hatred and fear to keep itself in power. This small, privileged group first set the majority against the minority to counter growing political opposition within Rwanda. Then, faced with RPF success on the battlefield and at the negotiating table, these few holders of power transformed the strategy of ethnic division into genocide. They believed that the extermination campaign would restore the solidarity of the Hutu under their leadership and help them win the war, or at least improve their chances of negotiating a favorable peace. They seized control of the State and used its machinery and its authority to carry out the slaughter.

Like the organizers, the killers who executed the genocide were neither demons nor automatons responding to ineluctable forces. They were people who chose to do evil. Tens of thousands, swayed by fear, hatred, or hope of profit, made the choice quickly and easily. They were the first to kill, rape, rob and destroy. They attacked Tutsis frequently and until the very end, without doubt or remorse. Many made their victims suffer horribly and enjoyed doing so.

Hundreds of thousands of others chose to participate in the genocide reluctantly, some only under duress or in fear of their own lives. Unlike the zealots who never questioned their original choice, these people had to decide repeatedly whether or not to participate, each time weighing the kind of

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action planned, the identity of the proposed victim, the rewards of participating and the likely costs of not participating. Because attacks were incited or ordered by supposedly legitimate authorities, those with misgivings found it easier to commit crimes and to believe or pretend to believe they had done no wrong.

This section gives more information about the genocide in 1994 in order to prove the failure of the State to perform its primordial duty of protecting its citizens.

a. Organization

In the past, the Rwandan government had at times mobilized the population for campaigns of various kinds, such as to end illiteracy, to vaccinate children, or to improve the status of women. It had tried to execute these efforts through the existing administrative and political hierarchies, requiring agents to go beyond their usual duties for a limited period of time for some national goal of major importance. The organizers of the genocide similarly exploited the structures that already existed—administrative, political, and military—and called upon personnel to execute a campaign to kill Tutsis and Hutus presumed to oppose "Hutu Power". Through these three channels, the organizers were able to reach all Rwandans and to incite or force a number of Hutus into acquiescing in or participating in the slaughter.

The organization that ran the campaign was flexible: primacy depended more on commitment to the killing than on formal position in the hierarchy. Thus within the administrative system, sub-prefects could eclipse prefects, as they did in *Gikongoro* and *Gitarama*, and in the military domain lieutenants could ignore colonels, as happened in *Butare*. This flexibility encouraged initiative and ambition among those willing to purchase advancement at the cost of human lives. To preserve appearances, an inferior might obtain the approval of his superior for decisions he made, but those receiving the orders knew who really had the power.[769]

Similarly, actors bypassed the usual legal and bureaucratic limitations on their activities. Military men, retired or in active service, took charge in the civilian domain[770] and civilians, even those with no legal authority, obtained military support for their attacks on Tutsis. Administrators gave orders to militia groups and *Interahamwe* leaders intervened in the administrative realm, as when their national committee ruled on the acceptability of the candidate to replace the prefect of *Butare*. Party leaders, especially from the MRND and the MDR POWER participated in meetings of the council of ministers

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[769] Details of the cases mentioned in this section are found in DesForges, A., Leave none to tell the story: Genocide in Rwanda, Human Rights Watch Report, March 1999.

[770] One example given by Human Rights Watch is Col. Simba who took the chair of prefectural meetings away from the prefect of Gikongoro. Id., at 5.

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while others represented the interim government abroad in its efforts to legitimate the genocide.[771] The Prime Minister and the Ministry of the Interior directed prefects to involve local politicians in the efforts to assure "security." They did and they made sure their subordinates did the same.[772] Like officials of the administration, important party leaders were protected by military guards and, like them, they toured the hills bringing the message of the government to the people. Individuals from other sectors backed the efforts of the officials.

b. The military

Soldiers and National Police, whether on active duty or retired, killed civilians and they gave permission, set the example, and commanded others to kill. Although fewer in number than civilian killers, the military played a decisive role by initiating and directing the slaughter. In the first hours in Kigali, soldiers of the Presidential Guard and the para-commando and reconnaissance battalions, along with some policemen, carried out the carnage in one neighborhood after another. Soldiers, National Police and the communal police also launched the slaughter and organized all large-scale massacres elsewhere in the country.

Witnesses in Kigali and other towns have identified certain soldiers and policemen whom they knew before the genocide as killers. But elsewhere witnesses found it difficult to identify the persons or even the units responsible for given crimes because soldiers and National Police wore the same uniforms and only sometimes wore berets of different colors that indicated the service to which they belonged. Witnesses often said that soldiers from the Presidential Guard attacked them, but troops from other army units or from the National Police may actually have committed some of these crimes.[773]

Regardless of the responsibility of individuals or units, the widespread and systematic participation of military personnel throughout the entire period of genocide indicates that the most powerful authorities at the national level ordered or approved their role in the slaughter.[774]

On April 10, the temporary Chief of Staff, and the Ministry of Defense each ordered subordinates to halt the killings of civilians, using force if necessary. The Ministry of Defense sent a second, weaker

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[771] For example, Karemera was subsequently named minister of the interior and community development and Barayagwiza became secretary of the assembly created just before the interim government left the country.

[772] Ministiri w'Ubutegetsi bw'Igihugu n'Amajyambere ya Komini [actually signed by C. Kalimanzira] to Bwana Perefe wa Perefegitura (Bose), April 21, 1994 and Yohani Kambanda, Ministiri w'Intebe, to Bwana Perefe wa Perefegitura (Bose) April 27, 1994 (Butare prefecture).

[773] In interviews by Human Rights Watch/FIDH, researchers found "Presidential Guard" used as a generic term for military personnel who killed Tutsi and "Interahamwe" used as a generalized description for civilian bands of killers.

[774] Sources indicate certain names of people identified as leaders who launched the genocide or who, at least, collaborated actively with the leaders while others carried out the killings of Tutsi and Hutu civilians. For his security, the

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command on April 28 "to cooperate with local authorities to halt pillage and assassinations." But neither the general staff nor the Ministry of Defense enforced the orders, leaving subordinates to conclude that the directives had no importance. In fact, as some officers had observed from the start, the authorities countermanded the official orders by another message, passed discreetly to like-minded officers who executed the informal order to kill rather than the official directive to stop the killings.[775]

The military also led militia and ordinary civilians in slaughter, giving orders to citizens directly and through civilian administrators. At the national level, civilian and military authorities directed the population to obey these orders, insisting that civilians must "work with," "assist," or "support" the army.[776] According to a foreign witness, soldiers taught hesitant young people to kill on the streets of Kigali. When the young people balked at striking Tutsis, soldiers stoned the victims until the novices were ready to attack.[777] In the prefecture of *Gitarama*, soldiers said to be Presidential Guards drove around in a black *Pajero* jeep, killing and inciting others to kill in the communes of *Musambira* and *Mukingi*. Others launched the killing of Tutsis at a market in the commune of *Mugina*. In *Kivu* and *Kinyamakara* communes in *Gikongoro*, soldiers or National Police directed crowds gathered at market and people found along the roads to attack Tutsis. Soldiers led the killing in *Cyangugu* that started on April 7.[778]

Soldiers and the National Police distributed arms and ammunition to civilians discreetly before April 6 and openly after that date.[779] They also provided reinforcements in men and material to civilians who found it impossible to overcome resistance from Tutsis.[780]

Military personnel also ensured the spread of the genocide by refusing assistance to authorities, including the prefect of *Gitarama* and burgomasters in *Gitarama*, *Gikongoro*, and *Butare* who tried to stop the killing and other acts of destruction.[781]

In addition, soldiers and the National Police used force or the threat of force against Hutus who tried to resist the slaughter. At the request of such administrators as burgomasters, they intimidated

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author would not like to cite those names in this dissertation.

[775] Commandement des Forces Armées Rwandaises en Exil, "Contribution des FAR," 1996, pp. 96-103.

[776] Chrétien et al, Rwanda, Les médias, p. 299.

[777] Keane, K., Season of Blood, pp. 134-35.

[778] Human Rights Watch/FIDH interviews, Butare, August 18 and 19, 1995; Kigali, August 21, 1995; Mukingi, July 10, 1996.

[779] Augustin Ndindiliyimana, Témoignage à la Commission Spéciale Rwanda, Le Sénat Belge, April 21, 1994, p. 14.

[780] A medical assistant who was trying to kill Tutsi in the commune of *Ntyazo* at the end of April asked for military support: We have a large number of Tutsi at *Karama*. We have tried to fight them, but they have turned out to be stronger than we expected. So we ask for your help once again; send us a few National Police and four other communal police to help the population that is fighting with bows. P.S. We have guns and grenades. Letter from a Medical Assistant in *Ntyazo* to Adalbert Muhutu, Deputy, April 27, 1994 (CLADHO).

[781] Fidèle Uwizeye, "Aperçu Analytique sur les Evénements d'Avril 1994 en Préfecture de Gitarama, Rwanda," August 18, 1994.

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citizens into joining in attacks. Even more extraordinarily, they directed or permitted militia to exert the same kind of pressure on administrators if they dissented from the campaign of genocide.

Soldiers who had been wounded in war formed a particularly brutal category of military killers. Some joined in beating Belgian UNAMIR peacekeepers to death, others attacked Tutsis at the Adventist university at *Mudende*, and still others killed and harassed Tutsis in the town of *Butare*, at *Kabgayi*, and near the hospital at *Cyakabili*.[782]

c. Politicians and militia

Political leaders at every level championed the genocide, launching themselves into the killing campaign as a way to increase their own importance and to displace rivals. They were uninhibited by any of the formal responsibilities that sometimes constrained administrators and led them to disguise their intentions in indirect language. Invited by authorities to participate fully in official meetings from the national to the local level, they took the floor to demand ruthless action against Tutsis and those who helped them.[783]

Politicians used their personal authority and channels of communication within their parties to direct attacks on Tutsis.[784] In some cases, politicians organized "security" measures in accord with the local administrators. In other cases, where administrators showed no commitment to the genocide, political leaders effectively took over the extermination campaign in their communities.

Politicians claimed to speak for the people in demanding the extermination of the Tutsi when, in fact, they often incited them to make that demand.[785] Speeches heard on Radio Rwanda at times suggested that Tutsis intended to carry out a genocide of the Hutu:

> They are going to exterminate, exterminate, exterminate, exterminate [*ugutsembatsemba*]...They are going to exterminate you until they are the only ones left in this country, so that the power which their fathers kept for four hundred years, they can keep for a thousand years![786]

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[782] Des Prêtres du diocèse de Nyundo, "Des Rescapés du Diocèse," p. 61.

[783] See for example letter from the Minister of the Interior and Communal Development to the Prefect of Butare, April 21, 1994, no identifying number.

[784] In Taba commune, Gitarama prefecture, the local MRND leader distributed arms and launched killings. *See the testimony of the witness identified as DZZ, as reported by Ubutabera, No. 28, November 24, 1997, found at http://persoweb.francenet.fr/-intermed.* In Butare prefecture, one National Assembly Deputy arranged military support for civilian killers, another ordered barriers put up, and another reportedly patrolled with his own band of killers. *Human Rights Watch/FIDH interviews, Butare, December 19 and 29, 1995 and January 2, 1996; "Inama y'Abaturage ba Komini Ndora yo kuwa 7 kamena 1994," in Célestin Rwankubito, Burugumesitiri wa Komini Ndora, no. 132/04.04/2, June 16, 1994; Dominiko Ntawukuriryayo, S/prefe wa S.prefegitura Gisagara to Bwana Prefe, no. 083/04.09.01/4, April 15, 1994 and no. 008/04.17.02, June 8, 1994 (Butare prefecture).*

[785] Commission pour le Mémorial du Génocide et des Massacres, "Rapport Préliminaire," pp. 132, 155, 190, 192, 195-6.

[786] Chrétien et al., *Rwanda, Les médias*, p. 300.

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d. The militia in action

Political organizations provided the civilian striking force of the genocide, the militia. Before April 6, the militia—in the sense of those who had at least some training and experience fighting as a unit—numbered some two thousand in Kigali, with a smaller number outside the capital in communes where the MRND and the CDR were strong. Once the genocide began and militia members began reaping the rewards of violence, their numbers swelled rapidly to between twenty and thirty thousand for the country as a whole.

The *Interahamwe* was an unincorporated organization supposedly independent of the MRND, but heavily influenced by it. The militia was directed by a national committee that included a president, a first vice-president, a second vice president, a secretary-general, a treasurer and councilors. The *Interahamwe* had committees at the prefectural level, but it is unclear how important a role they played in the genocide. The best trained groups, those in *Kigali*, operated under the command of local leaders.[787] The *Impuzamugambi* had no leaders apart from those of the CDR.

Once the genocide began, there was virtually no distinction between *Impuzamugambi* and *Interahamwe* in the field, although members of each might still wear the distinctive garb or colors belonging to their parties. Some men participated in both groups, attacking when and where action seemed most profitable. As early as February, the *Interahamwe* were directed to cooperate also with *Inkuba*, the MDR POWER militia, but in the first days of the genocide, many MDR members - including those identified with MDR POWER - fought against the *Interahamwe* and *Impuzamugambi*. After *Karamira*'s April 12 message on the radio and similar directives by other party leaders, however, MDR youth groups began cooperating with the *Interahamwe* in attacking Tutsi. In *Butare*, the young supporters of the PSD also eventually participated in attacks with the *Interahamwe*, exchanging one party hat for another and putting into effect the order that it was time to forget party loyalties for the larger good of the killing campaign.[788] From the start of the genocide, political leaders put the militia at the disposition of the military.[789] The head of *Interahamwe* once explained to a reporter that "the government authorizes us. We go in behind the army. We watch them and learn. We have to defend our country. The government authorizes us to defend ourselves by taking up clubs, machetes and whatever guns we could find".[790] In his radio address on April 12, *Karamira* used the same phrase, remarking that the militias "go in behind the army." At major massacres, such

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[787] Human Rights Watch/FIDH interview, Brussels, May 26, 1997.

[788] République Rwandaise, Parquet de la République de Kigali, PV. no. 0053; Radio Rwanda, "Radio Rwanda broadcasts appeal by official of the pro-army faction of the MDR," April 12, 1994, SWB, AL/1970 A/2, April 13, 1994.

[789] Dallaire, "Answers to Questions," p. 39.

[790] Lindsey Hilsum, "Hutu Warlord Defends Child Killing," *Observer* (London), July 3, 1994.

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as the attack on *Gikondo* church on April 9, witnesses report that militia were clearly following the orders of the soldiers on the spot.[791]

In an account written later, the CDR leader recounts how the militia became real paramilitary forces once the "interethnic massacres" began: "the targets were no longer the youth of other political parties but the soldiers of the RPF, especially infiltrators in the ranks of civilians, as well as the civilian accomplices of the enemy".[792]

National leaders used the militia, as they did the military, to destroy Hutu opposition to the genocide. They sent groups across communal and prefectural boundaries to intimidate reluctant Hutus into attacking Tutsis.

Although generally responsive to directives from civilian and military authorities, leaders of the militia represented a force with its own base of power—particularly as the number of their members grew—and they dealt with authorities at the highest level. On occasion they met with ministers, prefects, and the chief of staff of the army.[793] Like the leaders of political parties, they often claimed to speak for the people in demanding the most extreme measures against Tutsis. In early May, militia attacked a convoy of civilians leaving the Hotel *Mille Collines* although it had received safe conduct from General *Bizimungu*. In a similar case in mid-May, U.N. officers negotiated for three hours to obtain the authorization of military and civilian authorities to evacuate a group of orphans. Then some young militia members in tee shirts and jeans stood up and imposed conditions that made the operation impossible. The officials said nothing and the effort failed.[794]

e. The Administration

The military and the militia brought essential skills and firearms to the slaughter, but they were too few to kill Tutsi on a massive scale in a short span of time. Executing an extermination campaign rapidly required the mobilization of hundreds of thousands of ordinary people, tens of thousands to actually slaughter and the others to spy, search, guard, burn and pillage. In some situations, crowds were needed immediately and for only a few days to participate in a massacre; in others, a reliable supply of long-term "workers" was required to do patrols, man the barriers and track survivors. Some military officers, the militia and some newspapers had foreseen that turning out large numbers of civilians was the only way to attack an "enemy" dispersed through the population. As *Karamira* had said in his radio speech of April 12, this "war" had to become everyone's responsibility.

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791 "Radio Rwanda broadcasts appeal"; U. S.Committee for Refugees, "Genocide in Rwanda," pp. 4-9.
792 Human Rights Watch, Leave none to tell the story, p. 36.
793 UNAMIR, Notes, Radio Rwanda, 20:00 hrs, April 24, 1994.
794 "Ce sont les miliciens qui commandent', selon Bernard Kouchner," BQA, no. 14217, 20/05/94, p. 18.

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The interim government directed the administration to carry out this mobilization. Some ministers already known for their determined support of "Hutu Power" were apparently the most insistent about executing the genocide.[795] Judging from the way Interim President *Sindikubwabo* and interim Prime Minister *Kambanda* were assigned their roles in the government, they probably lacked the stature to influence major decisions, but they nonetheless shared responsibility for implementing them.[796]

f. Passing the word

On April 19, Interim President *Sindikubwabo* identified his government as "a government of saviors" that would come directly to the people "to tell you what it expects of you."[797] Ministers and other high-ranking government representatives did indeed go out to the countryside, exhorting and insisting on the need to support the genocide, promising rewards to supporters and threatening sanctions against dissenters.[798] The practice of going out to the hills had been used to mobilize people for projects of public good, but it also harked back to the 1960s when ministers undertook tours of rural areas to set off the killing of Tutsis.[799]

In the continuing absence of the minister of interior and communal development, the administrative head of the ministry, *Callixte Kalimanzira*, was responsible for implementing the government policy. He counted on a bureaucracy that was known for executing orders promptly and fully. When he directed subordinates to "alert the population to the necessity of continuing to track the enemy wherever he is to be found and wherever he hid his arms," most of them did so. To make clear that directives about "security" came from the highest authorities and must be obeyed, *Kalimanzira* ordered that speeches by the president and the prime minister be disseminated widely. This would serve, he said, to make citizens "more determined to assure their own security and to warn all troublemakers."[800]

When *Kalimanzira* directed that meetings about security be held, prefects passed the order to burgomasters, who scheduled meetings and alerted councilors and cell heads. The burgomaster of *Bwakira*, for example, wrote to subordinates on April 19, ordering them to inform all residents of a series of scheduled meetings. He told them to use whistles and drums to summon the population "so

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795 Human Rights Watch/FIDH interview, Brussels, October 19 and 20, 1997.

796 Jean Kambanda confessed and pleaded guilty to genocide at the International Criminal Tribunal for Rwanda. On September 4, 1998, he was sentenced to life in prison.

797 "Discours du Président Thodore Sindikubwabo prononcé le 19 avril 1996 à la Préfecture de Butare" (Recorded by Radio Rwanda, transcription and translation, confidential source). The term "saviors," *abatabazi*, described heroes of the Rwandan past who sacrificed their lives to protect the nation from foreign attack.

798 Human Rights Watch, Leave none to tell the story, at 39.

799 Lemarchand, *Rwanda and Burundi*, p. 223.

800 Fawusitini Munyazeza, [signed by Callixte Kalimanzira] Minisitiri w'Ubutegetsi bw'Igihugu n'Amajyambere ya Komini

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that no one will be absent."[801] Prefects and sub-prefects expected and received reports of these meetings, many of which were recorded in minutes that were carefully taken and neatly transcribed.[802]

Administrators were responsible for informing their superiors of all important developments within their jurisdictions. In correspondence, in telephone conversations, and in meetings they regularly reported on the "state of security."

In orders passed down the administrative hierarchy, as in the reports passed back up, crucial elements were sometimes left unstated, or were expressed in vague or ambiguous language.[803] Superiors told their subordinates to seek out the "enemy" in their midst, but did not specify what was to be done with him when found. Subordinates reported on the capture of "accomplices" but neglected to mention what measures had been taken against them. No one asked for further clarification because everyone understood.

As was usual in Rwanda, authorities at the national level even dealt with matters of detail. The widespread use of banana leaves or other foliage to distinguish attackers from intended victims throughout the country suggests a decision made in *Kigali*, as does the frequent reliance on whistles as a means of communication among assailants.

g. Mobilizing the population

Prefects transmitted orders and supervised results, but it was burgomasters and their subordinates who really mobilized the people. Using their authority to summon citizens for communal projects, as they were used to doing for *umuganda*, burgomasters delivered assailants to the massacre sites, where military personnel or former soldiers then usually took charge of the operation. Just as burgomasters had organized barriers and patrols before the genocide, so they now enforced regular and routine participation in such activities directed against the Tutsi. They sent councilors and their subordinates from house to house to sign up all adult males, informing them when they were to work. Or they drew up lists and posted the schedules at the places where public notices were usually affixed.

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to Bwana Perefe (all), April 21, 1994, two letters, no identifying numbers (Butare prefecture).

[801] Tharcisse Kabasha, Bourgmestre wa Komini Bwakira, to Madame, Bwana Conseiller wa Segiteri (Bose), Bwana Responsable wa Cellule (Bose), no. 0.293/04.09.01/4, April 19, 1994 (Bwakira commune).

[802] For one example, see Dominiko Ntawukuriryayo, S/prefe wa S/prefegitura Gisagara to Bwana Burugumesitiri wa Komini (Bose), no. 088/04.09.01/16, May 14, 1994 (Butare prefecture).

[803] The International Criminal Tribunal for Rwanda in the Matter of the Trial of Jean-Paul Akayesu, case no. ICTR-96-4-T, draft transcripts (hereafter ICTR-96-4-T), Testimony of Jean-Paul Akayesu, March 12, 1998.

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Burgomasters were responsible for ensuring the continuity of the genocidal work over a period of weeks, a task that many found difficult. "Intellectuals" were needed at barriers to read documents presented by passersby, but many disliked the duty and tried to evade it. Some councilors tired of making the rounds to check on the functioning of barriers. Burgomasters threatened sanctions against laggards and removed councilors who failed in their responsibilities. The administrators also had to resolve squabbles among participants and sometimes resorted to having them draw up written agreements, such as that produced by workers assigned to the checkpoint near the TRAFIPRO shop in the commune *Bwakira*. All the participants agreed to "be more vigilant" and to refuse bribes. They were reminded to check identity cards and baggage carefully and to interrogate all passersby. They were cautioned against drunkenness and disagreements. "To avoid such disorders, the meeting resolved to create teams, with a leader for each team. The leader will be accountable... for whatever happens at his checkpoint. He will be responsible for the success of the patrol. Every team will have its own patrol day." And because "it is not easy to check everyone, since some travelers dodge checkpoints," the group asked the whole population to stop and interrogate any unfamiliar person, wherever encountered.[804]

Burgomasters, as well as those above and below them in the hierarchy, worked with local councils in implementing the genocide. In some cases, the elected communal council assisted them, but more often a committee or council devoted specifically to security played this role. Security committees had existed before April 6 at the level of the prefecture and commune and, in some places, in sectors and cells as well. At the prefectural and communal levels, they had included government employees, military or police officers, and other locally important people such as clergy. At the lower levels, they were comprised mostly of community leaders. After the genocide began, administrators set up security committees for jurisdictions where they had not previously existed and gave new importance to committees that before had existed in name only. The officials regularly invited party leaders to meetings, as was being done at the national level and as they had been directed to do by the Minister.

Burgomasters occasionally called in soldiers or policemen, particularly if there were many Tutsis to kill. More usually they relied on local resources: the population, militia, and the communal police. In the course of the preceding months, many communal police had received new firearms or additional supplies of ammunition so they were well equipped to serve as the local force for slaughter. They often guarded the sites where Tutsis had gathered until groups of assailants were organized for the attack and they then helped direct the massacre. Others led search parties to capture and kill Tutsis

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[804] See for example Bwakira commune, "Inyandikomvugo y'Inama y'Abashingzwe Gucunga Barriere yo kuri Trafipro,

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in their homes or in the bush.[805] Although most communal police followed orders to participate in the extermination, some did refuse. Others were killed themselves, either because they were Tutsis or because they tried to save the lives of Tutsis.

Burgomasters used the same forces to oblige dissident citizens to join in the genocide. They directed or permitted communal police, militia, or simply other citizens to burn down houses and to threaten the lives of those who refused to join in the violence.[806]

They also offered powerful incentives to draw the hesitant into killing. They or others solicited by them provided cash payments, food, drinks and, in some cases, marijuana to assailants. They encouraged the looting of Tutsi property, even to the point of having the pillage supervised by communal police. In many areas, authorities led the people from one stage of crime to the next as they directed them from pillaging property to burning homes, to killing the owners of the homes. In several places, police reprimanded those people who wanted only to pillage and not to kill. Assailants at *Nyundo* reminded each other "Kill first and pillage later."

One of the most important resources for the burgomaster in enlisting participants was his authority to control the distribution of land, a much desired and scarce source of wealth for the largely agricultural population. Hutus who had attacked Tutsis in the 1960s had acquired the fields of their victims. A generation later, people again hoped to get more land by killing or driving away Tutsis. Some still believed that "the properties of the victims belong to them."[807] Later, some would comment that people were cultivating lands taken from victims "to reward themselves for the work they had done."[808] "Work" meant "killings."

h. Enforcing regulations

The burgomaster did more than just recruit and organize participants for attacks and patrols. As head of the local administration, he became the arbiter of life and death through the implementation of administrative regulations. Because population registration was done at the commune, the burgomaster was the ultimate authority in cases of contested ethnic classification. In the commune of *Bwakira*, the burgomaster responded to an appeal from a woman named *Mujawashema* who said

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May 17, 1994" (Bwakira commune).

[805] ICTR-96-4-T, Testimony of Jean-Paul Akayesu, March 12, 1998.

[806] Broekx, J., "Les Evénéments d'Avril 1994 à Rusumo," *Dialogue*, no. 177, August-September, 1994, p. 100; Buchizya Mseteka, "We Were Trained to Kill Tutsis," Reuter, May 20, 1994; Tina Susman, "Quiet Parish Paradise Destroyed by Massacre," Associated Press, May 31, 1994.

[807] Bwakira commune, "Inyandiko-mvugo y'inama ya Komini yateranye kuwa 5.5.94" (Bwakira commune). "Inyandiko-mvugo" (sometimes with variant spellings) means minutes of a meeting.

[808] Bwakira commune, "Inyandiko-mvugo y'inama ya Komini yateranye kuwa 20.5.94" in Tharcisse Kabasha, Bourgmestre wa Komini Bwakira to Bwana S/Prefe, no. 0329/04.04/2, May 31, 1994 (Bwakira commune).

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people accused her children of being Tutsis and wanted to kill them. The burgomaster carried the research back three generations to the status of *Nsengiyumva*, grandfather of the children's father. From a file completed on April 16, 1948, the burgomaster learned that the great-grandfather of the children was a Hutu. He concluded, "Therefore, no one must harm those children."[809]

In the commune of *Ndora*, members of a family accused of being Tutsis wrote to the burgomaster:

> After the misfortunes that have struck our family in the course of the recent troubles, misfortunes caused by the jealousy and the hatred spread by certain residents of the commune against us and which resulted in the pillage of our goods, in the destruction of our houses, and even in the massacre of several of our family under the pretext that they could try to make them [i.e., the wrongdoers] pay for what they had done, and to this end, they have accused us of belonging to the ethnic group of the *Batutsi*, to the point that those [among us] who are safe owe this to their having a son in the national army; and even so, these residents are still pursuing them in the place where they have sought refuge. We are writing to ask your help especially concerning the question of our ethnic affiliation, which is the pretext put forward by the residents of the commune, that it be clarified and explained to them because the ethnic group in which we believe and with which we identify is that of the *Bahutu*.[810]

They concluded by giving the names of four past and present officials in the *Ndora* commune and others in *Gishamvu*, where the family had originally lived, who could verify their Hutu identity.

Persons who hoped to pass for Hutu often "lost" their identity cards and then requested temporary papers from the councilor or a new card from the burgomaster, hoping the administrator would be persuaded to falsify the document. In testimony at the International Tribunal about his powers during the genocide, one former burgomaster declared, "In the countryside, the mere fact of giving an attestation to a person sufficed to save him."[811] Tutsis who succeeded in obtaining such papers in their home communes sometimes found themselves caught by less obliging officials as they tried to flee through other communes. In another maneuver, Hutu mothers of children fathered by Tutsis sometimes tried to protect their children by claiming they were illegitimate and seeking to have them registered on their cards - as Hutus - rather than on the cards of the fathers. The burgomaster of *Huye* commune, reluctant to deal with these issues, passed such a case to the local judicial official, who passed it back to him with a bare explanation of the law that gave no real guidance on how to deal with the problem.[812]

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[809] Tharcisse Kabasha, Bourgmestre wa Komini Bwakira to Bwana Conseiller wa Segiteli Shyembe, no. 0.359/04.03/3, June 21, 1994 (Kibuye prefecture).

[810] Antoine Gakwaya, Fidele Muzamuzi, and Madame Leonille Usaba to Bwana Burugumesitiri wa Komini Ndora, May 25, 1994 (Butare prefecture).

[811] ICTR-96-4-T, Testimony of Witness R, January 28, 1997, p. 83.

[812] Jonathan Ruremesha, Bourgmestre wa Komini Huye to Bwana Procureur wa Repubulika, no. 154/04.05/2, May 18, 1994; Mathias Bushishi, Prokireri wa Republika, to Bwana Burugumesitiri wa Komini Huye, no. C/0520/D11/A/Proc., May 24, 1994 (Butare prefecture).

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In several cases the burgomaster himself or members of his family were accused of hiding a Tutsi identity behind an officially Hutu exterior. One of them, the burgomaster of *Mabanza*, appealed to the *Kibuye* prefect, *Kayishema*, to defend him. He wrote:

> Regarding my personal problem - [accusations] that my wife is a Tutsi, that I am supposedly an accomplice of the enemy, that I protect Tutsi and Hutu with Tutsi wives - these rumors are spread by my political opponents who want to replace me. My wife is a Hutu of the *Bagiga*, a large Hutu family who live at *Rubengera*, commune *Mabanza*. The accusations that my mother-in-law is Tutsi are groundless as well. And if she were, children take the ethnic identity of their father, not their mother. Those who say that my mother-in-law is Tutsi are wrong: she is from sector *Ruragwe*, commune *Gitesi*, from the *Barenga* family, a well-known Hutu family, as the burgomaster of *Gitesi* explained in his letter no. D 249/04/05/3 of June 6, 1994, addressed to the councilor of sector *Ruragwe* and of which you have a copy.[813]

Administrative officials recorded changes in the population extremely carefully before the genocide, noting births, deaths, and movement into and out of the commune on a monthly as well as a quarterly basis. With this data, officials knew how many Tutsis, whether male or female, adult or child, lived in each administrative unit, information useful in any attempt to eliminate them.

Even before April 1994, Rwandans were supposed to be registered in the communes of residence if these differed from their communes of birth. *Nyumbakumi*, cell heads, and councilors all were involved in making sure that no strangers lived unnoticed in a commune. With the start of the genocide and the renewal of combat, tens of thousands of people fled the capital, some heading directly south, others returning to their communes of origin, wherever they might be. Authorities and radio announcers warned from the start that the Tutsis among these displaced persons were often "infiltrators" in disguise and stressed the need to keep close track of them. Officials usually directed the displaced to a common gathering place and sought to discourage their taking shelter with private families, where it would be harder to keep track of them. But recognizing that some went to stay with friends or family, burgomasters passed instructions down to councilors, cell heads, and *nyumbakumi* that such people must be registered immediately.[814] Administrative officials also insisted that clergy or persons responsible for sheltering the displaced provide as much data as possible about those whom they were lodging. Administrators generally declared that such data was needed to assure adequate food supplies, but the information also allowed them to know how many Tutsis were still

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[813] Ignace Bagilishema, Bourgmestre de la Commune Mabanza to Monsieur le Préfet, no. 0.365/04.09.01/4, June 21, 1994.

[814] "Réunion de Conseil de Sécurité Elargi du 11 Avril 1994," Dr. Clément Kayishema, Préfet, Dirigeant, Janvier Tulikumwe, Rapporteur (Kibuye prefecture); Dominiko Ntawukuriryayo, S/Prefe wa S/Prefegitura Gisagara to Bwana Burugumesitiri wa Komini Ndora, no. 085/04.09.01/4, April 15, 1994 (Butare prefecture).

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alive and where they were staying. Often a gathering place was attacked soon after officials had collected data on the displaced persons sheltered there.[815]

Authorities also revived an earlier requirement that persons wishing to travel outside their communes receive written authorization to leave (*feuilles de route*). Burgomasters controlled the distribution of these documents which could permit Tutsis to try to flee for their lives. As a state of emergency was declared, burgomasters also decided who must obey the regulations to remain at home. Officials insisted that Tutsis remain in their houses while granting passes to assailants who could then move freely around the commune to attack them.

Burgomasters and other officials sought to keep accurate records on the dead and missing. In *Bwakira*, for example, the burgomaster ordered subordinates to prepare such lists on April 29. Five days later councilors submitted lists, by sector, of household heads who had died, the number of people in the household killed, and the number from the household who had fled. In *Butare*, at *Kabgayi* and elsewhere, some Tutsis were sent back to their home communes to be killed, in part to enable local officials to verify that they were actually dead. Burgomasters kept track, not just of the overall numbers of the dead, but also of the elimination of those persons named as priority targets in their communes. They seem to have borne final responsibility for ensuring that such persons had in fact been slain. Where there was any doubt that a person in question had in fact been killed, authorities would insist on seeing the body to confirm the death. In some cases, burgomasters tracked down escapees from their communes into adjacent areas, including those who had just sought temporary refuge in their jurisdiction before being driven away.

Burgomasters were also charged with disposing of the bodies. Sometimes they left the bodies unburied for days or weeks, a practice which contributed to the "normality" of violent death, but after a while public health considerations dictated disposal of the remains. Authorities summoned people for *umuganda*, which consisted of stuffing bodies down latrines, tossing them in pits, throwing them into rivers or lakes, or digging mass graves in which to bury them. In *Kibuye*, workers used a bulldozer to push bodies into a pit behind the little church on a peninsula jutting into the lake. In *Kigali*, *Gikongoro*, *Butare*, and elsewhere, authorities also called upon drivers of bulldozers to assist in disposing of the bodies. In *Kigali*, prisoners went through the streets every three days to gather up the bodies, a service that prisoners performed in *Butare* as well. One witness related his shock in the early days of killing when he came across a group of prisoners, dressed in their pink prison shirts and shorts, tossing cadavers into a truck. They were appropriating all valuables from the bodies, stripping glasses and watches from them, plunging their hands into pockets to be sure they had

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[815] Telegram from Minitraso to Préfet (tous), no. 016/94, May 4,1994 (Butare prefecture).

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extracted all they could from the dead, and then squabbling among themselves over the division of the spoils.[816]

i. Rape and sexual servitude

During the genocide, tens of thousands of women and girls were raped, including one who was only two years old.[817] The assailants raped as part of their attempt to exterminate Tutsis, some of them incited by propaganda about Tutsi women disseminated in the period just before the genocide. The women had been depicted as devious and completely devoted to the interests of their fathers and brothers. Generally esteemed as beautiful, Tutsi women were also said to scorn Hutu men whom they found unworthy of their attention. Many assailants insulted women for their supposed arrogance while they were raping them. If assailants decided to spare the lives of the women, they regarded them as prizes they had won for themselves or to be distributed to subordinates who had performed well in killing Tutsis. Some kept these women for weeks or months in sexual servitude. In the commune of *Taba*, women and girls were raped at the communal office.[818] At the *Kabgayi* nursing school, soldiers ordered the directress to give them the young women students as *umusanzu*, a contribution to the war effort. The directress, a Hutu, *Dorothée Mukandanga*, refused and was killed.[819]

Assailants sometimes mutilated women in the course of a rape or before killing them. They cut off breasts, punctured the vagina with spears, arrows, or pointed sticks, or cut off or disfigured body parts that looked particularly "Tutsi," such as long fingers or thin noses. They also humiliated the women. One witness from the *Musambira* commune was taken along with some 200 other women after a massacre. They were all forced to bury their husbands and then to walk "naked like a group of cattle" for some ten miles to *Kabgayi*. When the group passed roadblocks, militia there shouted that the women should be killed. As they marched, the women were obliged to sing the songs of the militia. When the group stopped at nightfall, some of the women were raped repeatedly.[820]

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[816] Human Rights Watch/FIDH examination of the grave site, Kibuye church, February 1995; Human Rights Watch/FIDH interview, Butare, May 25, 1995.
[817] Human Rights Watch/FIDH, *Shattered Lives*, p. 24.
[818] Fondation Hirondelle, "L'ancien maire de Taba aurait encouragé au viol de femmes Tutsies," October 23, 1997.
[819] Boniface Musoni, "Holocauste Noir," *Dialogue*, no. 177, August-September 1994, p. 88.
[820] Human Rights Watch/FIDH, *Shattered Lives*, pp. 54, 62-64.

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2.6.3.2 Liberty of the person

In addition to the reference to the Universal Declaration of Human Rights, the Constitution provided, in Article 15, that *"la liberté de la personne humaine est inviolable ..."*. According to this provision, no person could be deprived of his personal liberty without due process of law. However, the provision was limited by the reference to the Acts of Parliament and regulations of the Executive.[821]

Any person who was arrested or detained had the right to be informed as soon as reasonably practicable, of the reasons of his arrest or detention.[822] Furthermore, any person arrested or detained, with or without a warrant, if not released, had to be brought before a court without undue delay.[823] Unfortunately, there was no provision entitling any person who was unlawfully arrested or detained by any other person to damages from that other person. Instead, the courts ruled that the above-mentioned rights did not extend to persons who had been detained under emergency legislation, such as the *Décret* of October 20, 1959[824] which empowered the President or his delegate to detain without trial anyone he deemed to be a threat to public security, for an indefinite period.[825] Unfortunately, neither this *décret* nor the Constitution stipulated the procedural requirements with which a presidential detention needed to comply.[826]

The right to liberty has also been ridiculed by provisions of the code of penal procedure regulating the preventive detention.[827] Scholars have found that preventive detention is an exception to the sacred principle of liberty of the person because a person still presumed innocent is deprived of his liberty, his life is troubled, to say the least, he is subject to suspicion and his reputation and honour might be seriously undermined; it creates an excessive inequality between a detained suspect and a

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[821] There were ten situations in which the right to liberty could be derogated from: where a person had been convicted of a criminal offence or contempt of court (*Code de Procédure Civile et Commerciale, articles 211 and 212; see also Code Pénal, Livre II*); where an arrest warrant had been issued (*Code de Procédure Pénal, articles 25 and 28)*; where a person was reasonably suspected to be of unsound mind, addicted to drugs or alcohol (*Order No. 11/83 of February 14, 1959, B.O.R.U., 1959, P. 352)*, or a vagrant or a beggar, for the purpose of their care or treatment or the protection of the community (*Décret du Roi-Souverain, May 23, 1896, B.O.R.U., 1959, P. 1055)*; and for the purpose of preventing the unlawful entry of a person into Rwanda or for the purpose of effecting the extradition or other removal of that person from Rwanda (*Décret of 12 April 1886, B.O.R.U., 1959, p. 543; Law of 15 October 1963, J.O., 1963, p. 472, art. 18, 21, 22)*. A person could also lose his liberty when he was reasonably suspected of having committed, or about to commit, a criminal offence (*Code de Procédure Pénale, art. 38, 50, 53)*.

[822] *Code de Procédure Pénale, art. 38 - 40.*

[823] Id., art. 4, 38, 83, 86.

[824] *B.O.R.U., 1960, P. 759.*

[825] See for example Gatera v Ministère Public, RP 856/Ruh., 1988 (unreported); Ministère Public v Kagenza, R.P. 642, 1989 (Unreported).

[826] For some details, see infra 2 6 'Emergency Laws in Practice'.

[827] *Déret-Loi No. 07/82 of 7 January 1982, art. 37-53, J.O., 1982, p. 308.*

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free suspect.[828]

This principle is affirmed in Articles 12 and 15 of the Constitution, but the *Code de Procédure Pénale* describes, in an insufficiently firm manner, the procedure for criminal investigation and the limits of preventive detention. According to Article 37, the suspect can be put in preventive detention under two cumulative conditions: if there are serious clues about his guilt and the alleged offence is punishable with six months' imprisonment, at least. However, the same provision contains an evasion clause providing that the suspect can also be put in preventive detention if the alleged offence is punishable by imprisonment of less than six months but more than seven days, if there is cause for fear of his escape, or if his identity is unknown or doubtful, or if, in view of serious and exceptional circumstances, the preventive detention is imperiously required in the interest of public security. It is provided that, in that case, the provisional arrest warrant must specify the circumstances that justify it. It is clear that these exceptional circumstances are alternative, but they do not, by themselves, justify the preventive detention. They should be read concurrently with the requirement of serious clues about the guilt.

In a state of law, an exception to such an important principle must be shown strict and limited guarantees and necessity must be the only justification. However, preventive detention has been so abused in Rwanda that the people have lost confidence in penal justice, which they resent as arbitrary and disproportionately repressive.[829]

Examination of Article 37 shows that, on one side, the preventive detention has an exceptional nature and, on the other side, the conditions put forward are not sufficiently strict and limited.

As regards the procedure, Article 38 provides that if the required conditions are met, the public prosecutor can issue a warrant for the suspect's provisional arrest after interrogation and has to take him to the nearest competent judge to rule on the preventive detention. This appearance must be arranged no later than five days after the issuance of the warrant for provisional arrest if the judge sits in the same locality as the prosecutor, which is generally the case. If the locality is different, Article 38 extends the five days' delay to a strictly necessary period for the journey, save in case of absolute necessity or delays required by investigation duties. It can be observed that the period for

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[828]Brière De L'Isle, G. and Gogniart, P., Procédure Pénale, Paris, 1972, Vol. II, p. 130-131; Bouzat, P. and Pinatel, J., Traité de droit pénal et de criminologie, Paris, 1970, Vol. II, p. 216-218.

[829]For details, see Reyntjens, F., La grande misère de la détention préventive au Rwanda *in Revue Juridique du Rwanda, 1978/4, p. 364.*

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the journey should not go beyond two days in a small country like Rwanda.[830]

The judge in question in Article 38 is, according to Article 39, the judge-president of the *tribunal de première instance* or, in certain cases, the judge-president of the *tribunal de canton.* His order must be rendered no later than the days following the suspect's appearance and must be communicated to the suspect as soon as possible. Article 40 adds that the order authorising the preventive detention is valid for 30 days, renewable as long as the public interest and the necessities of the investigation require so. This means that a warrant for provisional arrest not confirmed by an order from a competent judge-president within five days is in principle invalid, and so is a judge-president's order that is not renewed after 30 days. However, Article 25 of the *Code de Procédure Pénale* empowers the public prosecutor to circumvent that principle by issuing a summons when the suspect is not present or when there are serious clues to the suspect's guilt and the offence is punishable with two months' imprisonment. A suspect subjected to such a summons must be taken before the public prosecutor who issued the summons for interrogation as soon as possible on the day following his arrival at the place where judgement must be passed. He can then be placed in detention under a committal order during a period strictly necessary for the investigation.

However, Article 28 adds that the committal order can be renewed by the issuing officer in case of the absolute impossibility of taking the suspect to the competent judge to rule on the preventive detention. Unfortunately, this *"impossibilité absolue"* has not been defined anywhere and, thus, has been given a wide interpretation, opening the door to prolonged and unjustified detentions.

This argument is supported by the fact that suspects have been detained under the *Procès-Verbal d'Arrestation (*PVA*),* which is a simple report that any *officier de police judiciaire* can draw up and under which a person can be detained for 24 hours only before a decision is taken on his detention or release.[831] In this respect, 1,543 people were detained in Kigali prison in January 1978. Of these, 687 (44.52%) were under PVA and 139 (9%) under warrant for provisional arrest, which means that 53.52% of the inmates were detained before trial and without an order from a competent judge-president and the period of detention varied between one month and four years.[832] At the same time, 195 people were detained in *Butare* prison, 91 (46.66%) under PVA and 24 (12.30%) under warrant for provisional arrest, meaning that 115 suspects (58.97%) were detained before trial and without an

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[830]Id.

[831]The period of 24 hours is implicitly stated in the *Code de Procédure Pénale* and explicitly imposed by ministerial orders No. 01/E.02/C/70 of January 3, 1970, and No. 32/9/05.00 of October 14, 1974.

[832]See Reyntjens, Pouvoir et droit au Rwanda, at 368.

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order from a competent judge-president. In the Kigali prison the period of detention was the same as in the other nine prisons of the country.[833]

On various occasions even the PVA was not drawn up and people were just arrested and thrown into jail or other places of detention. For example, in reaction to the attack on military garrisons in the north-east of Rwanda by the Rwandan Patriotic Front on October 1, 1990, the gendarmes, soldiers and presidential secret police arrested without warrant about 10,000 civilians, nationals and foreigners, including minors, aged persons and pregnant and breast-feeding women. Many of these arrested were locked up in *Nyamiranbo* soccer stadium where the health of some of them deteriorated, others were dispatched to the different prisons of the country.[834]

Moreover, Article 6 of the *Code de Procédure Pénale* empowers every person to apprehend a suspect of any *flagrante delicto*, including but not limited to common law offences, punishable with three years' imprisonment, in the absence of any competent public officer, and to take him immediately to the nearest competent public officer. Here, again, the right to liberty was exposed to violation due to the lack of precision of the provision. In a country like Rwanda, where more than half of the population is illiterate, it is not possible for a great number of people to figure out how seriously or less seriously the penal code punishes a given offence. Furthermore, although there are no adequate statistics to make this situation concrete, one should suspect, to some extent, that, since the State has always been ethnically based, the competent officer of the day would not be inclined to quickly remedy a false arrest made by men of his ethnic group of a suspect belonging to the other ethnic group, especially after 1990 when ethnic tension increased.

2.6.3.3 Freedom from slavery and forced labor

Article 17 prohibited any form of slavery and bondage and Article 40 forbade forced labour. However, a person could be required to perform any labour when the nation was at war or during an emergency[835], in case of accidents, turmoil, wrecks, flooding, fires and other calamities, as well as in case of robbery, pillaging, *flagrante delicto*, public clamour or judicial execution;[836] as part of the obligation to assist troops of the public force;[837] or as part of other national, civil, or military

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[833]Id.

[834]*Le Soir, 14 October 1990.*

[835]*Ordonnance-Loi of 23 May 1943, article 2, B.O.R.U., 1943, p. 107..*

[836]*Décret du Gouverneur Général, 9 February 1891, article 1, B.O.R.U., 1943, p. 755.*

[837]*Loi sur la Réquisition No. 112/F.P, B.O.R.U., 1943, p. 6.*

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service.[838] A person who was lawfully detained could also be required to perform any labour that was reasonably necessary in the interests of hygiene or for the maintenance of the place at which he was detained.[839] Furthermore, a member of a disciplined force such as the army or the police could also perform labour in pursuance of his duty as such.[840]

There were no reported violations of the right to protection from slavery. As regards forced labour, President *Habyarimana,* despite the clarity of Article 40, forced people to perform the *umuganda* (communal development labour) after the coup d'Etat of July 5, 1973 which overthrew President *Kayibanda*. Although this labour, not provided for in any written law, was supposed to take one day a week out of a Rwandan citizen's time, it often took more. And contrary to party cadres' enthusiastic descriptions, the work was far from always being voluntary and amounted to forced labour.[841] In rural areas where 96% of Rwandans lived, each adult citizen was required to buy a book in which a supervisor had to mark his presence and participation. There was no difference in treatment of Hutus and Tutsis in this regard.

2.6.3.4 Freedom from torture and inhuman treatment

Apart from providing that *"la personne humaine est sacrée, elle est protegée par l'Etat"*, Article 12 did not explicitly prohibit torture, inhuman and degrading punishment or other treatment. Moreover, certain punishments which may be considered to constitute inhuman or degrading treatment such as the death penalty[842] and ill-treatment were allowed in theory and/or in practice. Torture and inhuman treatment were extensively practised by the police to extract confessions from suspects. Reports are replete with cases in which the accused complained of having been forced to confess to crimes as a result of severe torture at the hands of the police or officers from the *Service Central de Renseignement*, the secret police in the Office of the President.[843]

Anyone who had passed through one local cell would swear that they were places of indiscriminate

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[838]One-party Constitution, art. 28.

[839]See Ordonnance No. 111/127 of 30 May 1961, B.O.R.U., 1961, p. 951 as modified.

[840]Ordonnance No. 081/220 of 4 October 1958.

[841]Guichaoua, A., *Travail non rémunéré et développement rural au Rwanda: pratiques et perspectives, Geneva: ILO, 1990.*

[842]Amnesty international, for example, is unconditionally opposed to the death penalty. It opposes the death penalty "because it is a violation of the right to life and a violation of the right not to be subjected to cruel, inhuman or degrading treatment or punishment". Amnesty International, AI Index: AFR 47/4/98, 26 January 1998.

[843]See for example *Revue Juridique du Rwanda, 1978/3, p. 407-425.*

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beatings, torture and other inhuman acts.[844] Apart from their inevitable dreariness and designated solitariness, local cells had won or acquired even more terrifying dimensions because of the manner in which policemen treated suspects and would-be inmates. It had become a foregone conclusion[845] that, whenever a citizen was arrested by the police or army soldiers for allegedly committing whatever crime or offence, the initial treatment received from the men of the law was a beating. An arrest in Rwanda had over the years become synonymous with a beating by policemen.[846] One was supposed to be pummelled down to his right senses if he was picked up.[847] And while the majority of policemen had evidently come to believe in this logic, the average Rwandan had also come to think similarly.[848] This unfortunate correlation of wrong and misplaced perceptions of law and order had created a whole spectrum of morbid violence and nasty mannerisms in detention centres. Indeed, chaos, anarchy and absolute illegality had reigned as opposed to legality.

Common methods of torture included: severe beatings; denying suspects food, water and medical attention; putting suspects in solitary confinement; and applying pliers, and electric shocks to, or forcing iron objects into genitals and the anus, etc.

The following are examples of subjection to torture: In December 1962, after Tutsi refugees had attacked the country, a number of Tutsis in the country were subjected to torture. *Nsengiyaremye* gives the example of *J. Rutsindintwarane, C. Gasimba, E. Afrika, C. Karinda, D. Burabyo, M. Rwagasana, M. Ndahiro, M. Mpirikanyi* and *P. Bwanakweri* who died as a result of torture applied by the national police in Ruhengeri.[849] Although statistics are lacking for the remaining period of the First Republic,[850] *Callixte Matabaro*, a Rwandan priest since 1964, affirms that "torture was commonly resorted to, sometimes against Tutsi opponents, sometimes against ordinary criminals".[851] According

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[844]See for example Amnesty International, Reported arrests of Prisoners of conscience and extrajudicial executions in Rwanda, Monday 15 October 1990; Human Rights Watch Africa, April 1995, Vol. 7, No. 1, p. 4; Times of Zambia, Tuesday, July 25, 1995, p. 6; Reuters, Prison conditions: death of 40 detainees, Friday, 20 November 1998; United Nations Commission on Human Rights, 54th Session, Item 10 of the Provisional Agenda, E/CH.4/1998/60, 19 February 1998; Ubumwe, No. 56, June 1998, p. 6.

[845] This was one of the main challenges opposition parties addressed to the MRND and RPF before their suspension by the RPF government. *See for example Nsengiyaremye,* The unknown tragedy, *at 170.*

[846] Ibid.

[847]Matata, J., "Violations flagrantes des droits de la personne humaine dans les prisons rwandaises", in *Centre de Lutte contre l' Injustice et l'Impunité au Rwanda, 4 April 1997, p. 3.*

[848] Nsengiyaremye, The unknown tragedy, at 130.

[849] Ibid.

[850] Even for the Second Republic and the period of the RPF government, no reliable statistics are available. The few available cases will be dealt with.

[851] Interview with Matabaro, C., Nairobi 10 June 1997.Author's translation.

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to *Esdras Mpamo*, respectively Prefect and Ambassador during the First Republic and Burgomaster during the Second Republic, torture was "sometimes a necessity to know the enemy of the Republic and the offenders of the law".[852]

In February 1984, *Enos Nkinzingabo*, a farmer in *Kibuye*, was brutally assaulted by an *inspecteur de police judiciaire*.[853] In 1986, the *Tribunal de Première Instance* of *Butare* ordered the prosecution of an *inspecteur de police judiciaire* who allegedly had tortured *Joram Shyirakera*. *Shyirakera* had told the *tribunal* that, police had hand-cuffed his hands and legs, suspended him from an iron bar balanced between two tables and had severely beaten him, during pre-trial detention. [854]

In the same year a Burundian national was seriously tortured by *officiers de police judiciaire* and died in the *Butare* University Teaching Hospital, whereas in February 1987, *Enos Habyarimana*, a civil servant in the Ministry of Education, was brutally assaulted by two gendarmes in *Ruhengeri*.[855]

The tense political situation that prevailed in Rwanda before the invasion into eastern Rwanda on October 1, 1990 by Tutsis from the Ugandan army, was used by the government as an excuse for torture and other inhuman and degrading treatments practised on a number of Rwandan citizens. Using a fake attack on Kigali as a pretext, the government launched a massive wave of arrests.[856] It soon became obvious that these arrests did not target supporters of the Rwandan Patriotic Front (RPF) - there were very few and even these few were not all known to the police - but indiscriminately swept up educated Tutsis, opposition-minded Hutus, anyone who was in the bad books of the power elite and even their friends or business connections; arrests were often seen as a way of cancelling outstanding debts of foreign African residents, mainly Zaïrians and Ugandans, who, as small businessmen, were generally good for a financial squeeze.[857] Conditions of detention were terrible, people were herded like cattle into buildings unsuitable for holding large numbers and at times not given food or water for several days. Beatings, thefts and rapes were commonplace; some of the prisoners were beaten to death simply because they happened to do something that

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[852] Interview with Mpamo, E., Bukavu 23 June 1997. Author's translation.

[853]See *Tribunal de première instance de Kibuye, R.P 1140/Kib, 1984.*

[854]Policemen call this form of torture *"Ishanya". See Tribunal de première instance de Butare, R.P* 2122/But, 1986.

[855]*Kinyamateka No. 897, 10 March 1984.*

[856]On 9 October, the Ministry of Justice admitted the arrest of about 3,000 people. The real numbers were soon to swell to nearly 10,000, some of them being held till April 1991. There were very few charges and almost no trials. *See Fédération Internationale des Droits de l'Homme (FIDH) et al., Rwanda, Violations massives et systématiques des droits de l'homme depuis le 1er Octobre 1990, Paris, 1993, p. 14.*

[857]Kiesel, V., 'Une épuration qui ne vise pas que les Tutsi' *in Le Soir, 9 October 1990;* Reyntjens, L'Afrique des Grands Lacs en crise, 1994, at 95-6.

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displeased a drunken guard.[858]

The trend towards increased torture can also be exemplified by the acts of the RPF in its preparation for seizing power. In fact, the genocide and its accompanying atrocities were preceded by much cruel, inhuman and degrading treatment as early as 1990 when Tutsi rebels attacked from Uganda. Apart from rape, torture and live burial of people, Hutus were subjected to torture by Tutsis soldiers. In a method called *agafuni,* the victim was tied up with strong ropes. The victim was then struck firmly on the head with the socket of a used hoe. Generally, a single smartly executed blow was fatal and psychological suffering before execution was very intense. In *akandoya*, the victim was tied up with strong plastic cords, arms and hands at the back, legs bent backwards and tied together to the arms. The victim was then laid on the stomach and abandoned to die in this bow shape, generally from asphyxia. By means of the *briefcase* or *attach case*, the victim's arms were pulled up over the shoulders and tied at the back, together with the legs and then hung up. These methods of torture were widespread in the *Basiima House* where Major General *Paul Kagame* was the head of the Ugandan Military Security Office. They were used in Rwanda and thousands of unarmed and defenceless Hutu civilians have died since the 1990 attack.[859] Furthermore, Tutsi soldiers and security forces tortured people by hammering their joints and/or by mutilation: cutting off fingers, toes, ears and other sensitive parts of the body. The mutilated persons were then forced to spend the night in a room chilled with cold water. Throughout the night, they could neither go out nor visit the toilet. These ignominious treatments were carried out in order to force the victims to confess to having been involved in alleged crimes.[860]

Several explanations may be suggested for the prevalence of torture and police brutality. First, the low level of education of most of the junior officers who did not even have secondary school diplomas. This was aggravated by the fact that the training given to police officers was hopelessly inadequate *vis-à-vis* investigation techniques, handling of arms, and the law. As a result, they graduated from the police training school with little understanding either of the rights of suspects or acceptable investigation techniques. Worse, the *officiers* and *inspecteurs de police judiciaire* had no background in police training. Anyone who chanced to be known to a relative or a friend of the

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[858]Prunier, G., The Rwanda crisis, at 109. It will later be seen that Amnesty International expressed concern for prisoners suffering cruel, inhuman and degrading treatment in Rwanda jails. These included children under the age of 14 and babies with their mothers. See Chapter 3; *Amnesty International, UA 134/95, 9 June 1995.*

[859]It is from *Bisiima House* that Major General *Paul Kagame* would have got the nickname of *"Pilate"* as he always pronounced capital punishment for recalcitrant soldiers. *See Desouter, S. and Reyntjens, F., Les Violations des droits de l'homme par le FPR/APR, Working paper, I, June 1995.*

[860]Id.

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appointing authority could get a job in the police, and belonging to the ruling ethnic group was an asset. Little wonder that junior officers with poor educational backgrounds perpetrated most of the beatings of suspects.

Second, there had been no serious attempt to investigate complaints of torture or even to punish police officers who had engaged in such conduct. In numerous criminal trials and also in *habeas corpus* proceedings, countless defendants and detainees successfully proved their claims of torture. In most cases, however, no follow-up action to punish the culprits was taken by the authorities. Even in cases where defendants had died during interrogation and despite the public outcry, few investigations were undertaken to prosecute the responsible officers. In fact, when allegations of police brutality were made, senior police officers and political leaders often rallied to the defence of the police officers implicated. The rank and file in the gendarmerie and *police judiciaire* were encouraged to continue such misconduct because of the absence of effective sanctions.

Lastly, police brutality was encouraged by the fact that the majority of the people in Rwanda did not know what their rights and freedoms comprised. Being illiterate, they did not know the content of the bill of rights. This factor, coupled with the pre-colonial legacy of submission to the "*chefs*" (authorities), based on the fact that the "*chef*" was always right and had to be obeyed in everything, inhibited the capability of large numbers of Rwandans to challenge the wrongdoings of authorities. This assertion can also be supported by the Rwandan proverb that "*umugabo ni ucisha make*", which means here that a real man is the one who submits himself to the treatment meted out by his superior. Because of the widespread and persistent nature of the beating of suspects by the police and the army, many people believed that the police had the right to beat up suspects, and that any one arrested by the police is guilty of the crime with which he is charged, and therefore deserves to be beaten, and even to die on the spot. The foregoing form part of the reasons that underlie the culture of impunity in Rwanda.

2.6.3.5 Freedom from deprivation of property

Article 23 guaranteed the inviolability of the right to individual and collective property, but allowed infringement for reasons of public utility, in case and manner established by law and in return for fair and prior compensation. A 1979 *décret*[861] empowered the President of the Republic or the Minister of the Interior respectively with regard to projects of national interest or regional interest, to declare

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[861] *Décret-Loi* No. 21/79 of 23 July 1979, Codes et Lois du Rwanda, Vol. I.

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such private property as being of public utility, and authorised the Minister of Land to order the compulsory acquisition of private land. However, in some cases, the government assumed untrammelled power to unilaterally determine the compensation payable to the property owner. It made a mockery of the right of the individual to be paid fair and adequate compensation for his property. *Elias Murenzi*, for example, was evicted from his land, his house and his coffee plantation in 1980, following the government's decision to build the *Kigali-Butare* road. Despite his many appeals to administrative authorities, *Murenzi* was never compensated and died in extreme poverty.[862]

In 1989, following a presidential order to build the *Gitarama-Kibuye* road, *Joseph Karake* and his family were evicted from their eucalyptus plantation of 1.32 hectare. They were given just one hectare as a compensation and nothing else.[863]

The years 1962 through 1966 saw the implementation of a series of economic reforms, which were intended to put the economy under the control of Rwandans. At independence the economy was dominated by Europeans and Asians, because the shortage of skilled manpower and complete lack of pre-independence indigenous entrepreneurs severely restricted the ability of Rwandans to break into some already well-established fields of the economy. Although no rule was enacted to deprive foreigners of their properties, about 37 retail shops were affected by military action, which led, not only to the loss of livelihood of many Asians but also to the closure of shops in rural areas, as Asians left them and no Rwandan proved able to run them. When two Asians sued the government for compensation, they lost the case on the ground that the eviction was done for public interest and the court denied the responsibility of the State in the matter.[864]

The preceding discussion of Article 23 shows that the protection afforded to individuals was largely meaningless.

2.6.3.6 Privacy of home and other property

Article 22 guaranteed the privacy of correspondence and communications by post, telegraph, telephone or any other means and the inviolability of the domicile. However, these provisions limited the protection offered, by referring to the "law" for determination of restrictions. In this regard,

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[862] *Imvaho, No. 29/80, Nov. 1980.*

[863] Letter dated 26 September 1989 addressed to the Minister of Agriculture by *Joseph Karake*.

[864] See Basomingera, Introduction au Droit Constitutionel, at 89, (e).

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interception, searching and detention of means of transport, communication and transmission, as well as the suspension of the delivery of correspondence, when the country was at war, or mobilised, or when trouble or serious circumstances threatening public security or public interests prevailed.[865]

In *Ministère Public v Ntagarukanwa*[866], *Ntagarukanwa* was charged in the *Tribunal de Première Instance* of Butare with contravening *Décret-Loi* No. 61/79 containing exchange control regulations[867], by attempting to externalise Rwandan currency to *Bujumbura*. He allegedly posted 39 airmail envelopes containing Rwandan currency at *Butare*, which were discovered by a customs officer. The customs office opened, examined and seized the postal article without a search warrant. As he was not satisfied with the *Tribunal*'s ruling, *Ntagarukanwa* lodged an appeal before the court of appeal of *Ruhengeri,* which had to examine whether the opening, examination and seizure of the postal article constituted a contravention of the applicant's right to privacy of property as guaranteed in Art. 23 of the Constitution. The applicant argued, *inter alia*, that the actual method employed in the search and seizure of the postal articles went beyond the permitted derogations, i.e. a law that is made in the interest of defence, public safety, and public interests. The court of appeal held that the applicant's right to protection from deprivation of property was not violated as the taking of possession was expedient for a scheme of exchange control which was designed in order to secure the development of the nation's financial resources for a purpose beneficial to the community. This was because exchange control was within the permitted derogations.[868] With regard to the applicant's right to privacy, the court held that this right was not infringed as *Décret-Loi* 161/79, under which the customs officer was purported to act, was reasonably required for the development or utilisation of property for a purpose beneficial to the community. This fell within one of the permitted derogations. It was said, *inter alia,* that on the basis that the customs officer was duly authorised, his "reasonable suspicion" was objective and not subjective, that he had to form that suspicion in respect of a particular postal parcel and before he entered the post office, and that he had to satisfy somebody as to the grounds for his suspicion, so the action of the customs officer was *bona fide*.[869]

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[865]*Edit* of 20 October 1959, art. 1 & 4.

[866]RP 1792/But, 1979.

[867]J.O., 1979.

[868]R.P.A 1220/Nyab., 1979.

[869]Id. The applicant had submitted that neither Statutory-Order 61/79 nor a search conducted thereunder was justifiable because the Regulation did not provide for a search warrant to be obtained before the search was made and that, in fact, the customs officer did not obtain a search warrant before opening, examining and seizing the post articles. He argued that a search without warrant was fundamentally objectionable and has been so considered since 1765, when *Entic v Carrington* (1765), 19 St. Tr. 1030, enunciated the principle that law officers could not break into a man's home and search his person in order to obtain evidence. He also cited a number of decisions from the United States, such as *Wolf*

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As for freedom of expression, the court ruled that the applicant's freedom had not been infringed as the parcels containing the money did not constitute "correspondence" within the meaning of Article 21.

In practice, the right to privacy of property was widely violated. Anyone who has travelled by road in Rwanda will have encountered numerous roadblocks mounted by the army, para-military forces, gendarmerie or militia in agreement with soldiers throughout the country. Travellers have had their luggage and vehicles searched without their consent. Sometimes vehicles were even confiscated and this has been a way to enrichment for military and police officers. The searches have been conducted indiscriminately and without search warrants. Neither were most of the searches based on reasonable suspicion of criminal activity. Sometimes no specific persons were targeted, while at other times the target groups have been people belonging to the other ethnic group than the one ruling. Everyone in the vehicle had his or her luggage opened and searched. Property and currency were confiscated and seldom returned to their owners. For example, three gendarmes stopped and searched people at a roadblock on November 29, 1993. As they could not detect any "offence", they extorted gold watches and necklaces from ladies.[870] This, besides being a way of stealing, was a real violation of privacy.

The right to privacy was also violated on a massive scale during the so-called "operation clean-up", referred to above, especially since policemen and soldiers searched and stripped people to the skin without warrants.

These invasions of privacy were encouraged to a large extent by the fact that courts admit illegally obtained possessions as evidence. The landmark case in this area of law is *Ministère Public v Ntaganda*[871], where the applicant, a police inspector, was convicted of official corruption. He was alleged to have corruptly received a sum of 50,000 Rwandan francs in cans in consideration for the release of an impounded automobile belonging to the complainant. The evidence on which he was

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v Colorado 338 US 25, 27, ... The Attorney General had argued that despite the fact that the 4th Amendment went even further than the *Entic v Carrington* principle, the United States Supreme Court had long held that there was a fundamental difference between the search for ordinary criminal purposes and a search for contraband. He cited the case of *Carrol v United States*, 69 Law ed. 882, where the Supreme Court held that customs officers might, without search warrant, search vehicles and ships to prevent the import or export of contraband. He also cited *Frank v Maryland*, 3 Law ed. 882, where Justice Frankfurter held that apart from customs laws, inspection was not unconstitutional ... the court said: "the court accepts the argument that some distinctions should be made between a developed society and one which is still developing, thinks one must be able to say that there are certain minima which must be found in any society, developed or otherwise, below which it cannot go".

[870]This was accounted by one of the victims who was the author's co-worker.

[871]Cass. 123/79, 10 Nov. 1979.

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convicted was procured by means of a trap; the handing over of the money at issue by the complainant was pre-arranged with the police. The money was later recovered from the applicant's house during a search conducted pursuant to a search warrant. It was incontrovertible that the police officer in question, at the time he applied for a search warrant to be issued, had sworn that the money in question was in the applicant's house when, in fact it was in the police officer's own possession. The applicant argued that the said warrant was invalid and that the resultant search was therefore illegal, and that anything found as a result of such a search was inadmissible in evidence. The applicant relied on the United States Supreme Court case of *Mapp v Ohio*[872] in which the Supreme Court developed the so-called exclusionary rule as part of judicial methods to protect the rights of the individual. In terms of this rule, all evidence obtained by unconstitutional search and seizure is inadmissible in both Federal and State courts, regardless of its source. The Rwandan *Cour de Cassation* held that evidence illegally obtained, for example as a result of an inadmissible confession, is, if relevant, admissible on the ground that such evidence is a fact (i.e. true) regardless of whether or not it violates a provision of the Constitution or some other law.[873] However, the nature and purpose of the exclusionary rule is apparent from the findings of judges *Brandeis* and *Holmes* in the case of *Olmstead v United States*.[874] Judge *Brandeis* declared that "if the government becomes a law-breaker it breeds contempt for the law; and it invites anarchy". The purpose of the exclusionary rule is therefore to control the unlawful actions of law enforcers by excluding evidence illegally obtained. According to this rule it is more acceptable that a criminal escapes his due punishment than that the police, as servants of the community, do and become the masters of the law by placing themselves above the law and in so doing become guilty of non-compliance with the law. The acceptance of illegally obtained evidence by Rwandan courts seriously undermines the constitutional protection of the privacy of the home and other property. The police have no incentive to follow the appropriate procedures for obtaining evidence, since illegally obtained evidence is admitted as evidence anyway. Moreover, *officiers* and *inspecteurs de police judiciaire* who obtain evidence through illegal methods are never punished.

Thus, the protection afforded by Articles 21 and 24 was meaningless, for all practical purposes, as it

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[872] 367 U.S. 643 (1961)

[873] The court of appeal followed French, Canadian, Indian, Scottish and Privy Council decisions, which all proceed on the principal that evidence procured through illegal searches and seizures is admissible because it is a fact and relevant, and that such evidence cannot therefore be adversely affected by proof of illegality in the means of obtaining it. The Court referred to such cases as *R v Doyle* (1886), 12 ont. R. 347, *Att. General for Quebec v Begin* (1995) 5 D.L.R 394 (Canadian); *Emp. v Allahdad Khan* (1913), Cr. L. J. 236 (Indian); *Jones v Owen* (1870), 34 J. P 759 (English); *M'Govern v H. M Advocate* (1960) S.L. T 133; and *King v R* (1968) 2 All E. R 610 (Privy Council).

[874] 277 US 438 (1928).

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did not deter agents of the State from conducting illegal searches.

2.6.3.7 Provisions to secure protection of the law

Article 12 stipulated provisions that were designed to ensure that due process rights for suspect or criminal defendants were observed. No one could be arrested, imprisoned, prosecuted or convicted other than in the cases prescribed by the law in effect at the time of the perpetrated act and within the forms prescribed by law, and any person should be presumed innocent of the charges as long as a definitive conviction had not been delivered yet.

Article 81 appointed the judiciary as guardian of rights and freedoms with the mission to ensure the respect thereof within the conditions prescribed by the law. The independence of the judicial power was guaranteed by the same provision. As seen, the law prescribing the conditions for the respect of rights and freedoms included the *Code de Procédure Pénale* which, for a person who was charged with a criminal offence, guaranteed the right to be informed of the charge[875] and adequate time for the preparation of his defence[876], and the right to defend oneself and/or to be assisted by a lawyer of one's choice[877]; and the right to have the assistance of an interpreter[878]. Furthermore, no one could be tried in absentia without his or her consent[879] and all court proceedings had to be held in public, except for *in camera* cases ordered by judgement when publicity could endanger "public order or public morals".[880]

A person who could show that he/she had been tried by a competent court for a criminal offence and either convicted or acquitted could not be tried again for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal.[881] Neither could he be tried for a criminal offence if he showed that he had been pardoned for that offence.[882] A person could not be convicted of a criminal offence, save for contempt of court, unless

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[875]*Code de Procédure Pénale, art. 62.*

[876]Id., art. 67.

[877]Id., art. 75.

[878]Id., art. 11-15.

[879]Id., art. 74.

[880]*One-party Constitution, art. 100.*

[881]*Code Pénal, art. 5.*

[882]*Code Pénal, art 124-133.*

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that offence was defined and the penalty was prescribed in a written law.[883] The provisions contained in Article 15 of the Constitution and 16 of the *code de procédure pénale,* if observed, were sufficient to ensure that criminal defendants were accorded a free and fair trial by an independent and impartial tribunal, and to meet international standards.

However, there were numerous practical difficulties that made it difficult for criminal defendants to enjoy these rights. Most criminal defendants were, and still are, indigent and cannot afford to hire an attorney. As a result, and because most defendants do not understand their rights, they have not been able to defend them. Another major problem has been the shortage of courtrooms, magistrates, judges and prosecutors. This has led to numerous adjournments and delays, to the detriment of the accused who has to spend much time on endless court actions and spend a lot of money on long trips from his home to the court.[884]

2.6.3.8 Freedom of conscience

Article 18 provided that, "*La liberté des cultes et celle de leur exercice public, la liberté de conscience ainsi que la liberté de manifester ses opinions en toute matière sont garanties, sauf la repression des infractions commises à l'occasion de leur exercice*." This embraced freedom of thought and of religion, freedom to change one's religion or belief, and freedom, either alone or in community with others, and both in public and in private, to manifest and propagate one's religion or belief in worship, teaching, practice and observance. Therefore, for example, a person attending any place of education could not, without his consent (or if he was a minor, the consent of his guardian), be required to receive religious instruction or to take part in or attend any religious ceremony or observance if that instruction, ceremony or observance related to a religion other than his own.

Moreover, it should be unlawful to prevent any religious community or denomination from providing religious instruction for persons of that community or denomination in the course of any education provided by that community or denomination.

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[883]Read Constitution, art. 12 together with *Code de Procédure Pénale, art. 209-215.* Moreover, no one who was tried for a criminal offence could be compelled to give evidence at the trial. *Id., together with art 16 of the Code de Procédure Pénale.* In *Mangara v Etat Rwandais* (RPA *098/Nyab, 18/2/1986)* the applicant was charged with corruption in the *Tribunal de première instance* where he was compelled to prove that he had not been bribed to issue a birth certificate. He submitted that the judgement contravened the provisions of Article 16 of the *code de procédure pénale* which provided that a criminal defendant could not be compelled to give evidence of his innocence. The matter was referred to the court of appeal which declared the judgement unconstitutional and, therefore, null and void.

[884] A number of people spend many days away from their home because of adjournments and delays coupled with the lack of means of transport in most regions in rural areas.

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Finally, no person should be compelled to take any oath that was contrary to his religion or belief or to take any oath in a manner that was contrary to his religion or belief.

The exercise of freedom of conscience was, however, not absolute, since laws and regulations abridging freedom of conscience could be enacted in the interests of defence, public safety, public order, public morality[885]; or for the purpose of protecting the rights and freedoms of other persons.[886]

The scope of this freedom was considered in the case of *Kamangu v Etat Rwandais*[887]. In this case, the applicant, *Emmanuel Kamangu*, a 14 year-old boy, was suspended from school in June 1986, for having refused to sing the National Anthem and to salute the National Flag[888] on religious grounds, pursuant to the *Règlement Intérieur* of *Rubengera* Secondary School enacted on 10 January 1986 by the *Conseil de l'Ecole* (council of the school) headed by the Principal according to Article 62 of the *Loi No. 14/1985* organising primary, craft and secondary education, and Article 114 of the *Arrêté Présidentiel No. 509/13* that established general regulations for primary, craft and secondary education. The relevant parts of this legislation provide as follows:

> 62: *Le Président de la République peut fixer les programmes [...] de l'enseignement [...]*; 114: *La discipline doit être éducative. Le règlement interne des établissements en précise les exigences particulières. [...].*

Article 117 of the *Arrêté Présidentiel* empowers the Minister of Education, after examination of the report from the Teachers' Council, to suspend from attendance at the school any student who wilfully refuses to abide by disciplinary rules contained in the *Règlement Intérieur.* According to the *Règlement Intérieur* in question, students were required to conform to decisions taken by the school authorities and to file past in the schoolyard before starting classes in the morning.[889]

The applicant sought an order declaring the suspension unlawful and that he should be readmitted to the school without having to give any undertaking that he would sing the National Anthem or salute the National Flag.

The *tribunal* said the case raised two main issues, a legislative issue and a constitutional issue. The legislative issue was whether the *Règlement Intérieur* was invalid because it was in conflict with the

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[885]Constitution, art. 37, see also *Décret* of 20 October 1959 on the *état d'exception, B.O. 1959,p. 2412.*

[886]Constitution, art. 18, 2.

[887]*Kibuye, Tribunal de première instance, R.C. 923/86, 29/9/1986.*

[888] Letter signed on 14 June 1986.

[889] Règlement Intérieur, art. 1 and 2.

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Loi No. 14/1985 under which it was made. The constitutional issue was whether his suspension from the school and the refusal of his application for unconditional readmission thereto, constituted a hindrance in the enjoyment of his right to freedom of conscience, thought, and religion, guaranteed to him by Article 37 of the Constitution; and whether the *Règlement Intérieur was itself* in conflict with Article 37 of the Constitution and consequently null and void.

Legislative issue: The applicant contended, first, that the *Règlement Intérieur* did not prescribe any subject of instruction but merely prescribed a drill. As such it conflicted with the *Loi sur l'Education Nationale* and the *Arrêté Présidentiel*. The *Tribunal* accepted that it was a drill, but ruled that the prescription of the drill fell within the Principle's power. The *Règlement Intérieur* was therefore *intra vires* the Principle.

The applicant's second contention was that the *Règlement Intérieur* was in conflict with Article 60 of *Loi No. 14/1985* regulating primary, craft and secondary education which did not provide for either saluting the National Flag or singing the National Anthem as a condition for admission of students in the school. Omitting words irrelevant to the facts of the case, Article 60 reads: "*les élèves sont admis sur base des résultats obtenus..., du passé scolaire, de l'équilibre régional, ethnique et entre les sexes ... . Et dans le respect du principe de l'équité".* When the applicant was suspended, his father invoked these provisions and asked for his reinstatement. The *Tribunal* held that Article 60 did not afford him any assistance. He noted that he was not refused readmission because he was a Jehovah's Witness, but because he would not salute the National Flag or agree to do so in future; that although it was true that his attitude in this regard was dictated by his religion, this, at best, only made his religion a remote cause of his suspension and failure to achieve reinstatement - a cause *sine qua non*, perhaps, but not the cause *causens*, the proximate cause, which was what had to be looked at, and that that cause was the applicant's breach, and indicated continued breach of the *Règlement Intérieur.*

The *Tribunal*'s argument is hard to fathom. To describe religion as merely a remote cause of the applicant's suspension and continued exclusion from school defies logic. It was his religion that forbade him to sing the National Anthem and to salute the National Flag. In the author's considered view, it was the proximate cause of his exclusion from school. Religion was at the core of his case, as his conduct was dictated by it.

As regards Article 60, the *Tribunal* stated that the argument in relation to it raised one of the key questions of the whole case: "Is either the singing of the National Anthem or the saluting of the

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National Flag a religious ceremony or observance?" After considering a number of cases from the United States[890], England[891], and Canada[892], in which similar issues had arisen, the *Tribunal* said that it was abundantly clear from these cases that, where a religious opinion was in question, a subjective test had to be applied; that indeed it was impossible to test something as personal as an opinion in any other way, but that when the nature of a ceremony or observance was in question, a subjective test was inappropriate and its application could lead to anomalous reasons. It added that the ceremony itself had to be looked at objectively, but explained that this was not to say the subjective views of those attending the ceremony were not to be taken into account and that they would carry considerable weight; but they would not necessarily be decisive.

In order to determine whether or not the singing of the National Anthem and saluting the National Flag constituted a religious ceremony, the *Tribunal* asked itself, and answered, three questions.

First, by whom were the ceremonies instituted and with what object? The answer was that they were instituted on the directions of the State and not by any church or religious organisation. Besides instruction, their object was "to promote national unity and proper respect for the National Anthem and the National Flag as the secular, not religious, symbols of national consciousness."

Second, in the manner in which they are conducted, are they invested with any of the trappings of religious worship? The answer was that these ceremonies were not invested with the trappings of religious worship, because "they were not conducted by a priest, nor in a place of religious worship, nor made use of any equipment or books associated with religious worship."

Lastly, do the persons who attend the ceremonies regard them as religious? The Court concluded that "some persons, notably the applicant and his *Jehovah's Witness* colleagues, do genuinely and sincerely regard these ceremonies as religious."

After applying the objective test through the medium of these questions and answers the *Tribunal* held that, notwithstanding the views of the applicant and his colleagues, the singing of the National Anthem and saluting of the National Flag were not religious ceremonies or observances. Thus, the applicant's claim that he was entitled to be excused from singing the National Anthem and saluting the National Flag and, in consequence, reinstated at the school without the obligation to participate

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[890] *Wolf v Colorado* 338 US 25, 27, ...; *Carrol v United States*, 69 Law ed. 882; *Frank v Maryland*, 3 Law ed. 882; and Mapp v Ohio, 367 U.S. 643 (1961).

[891] *King v R*, 2 All E. R 610, 1968.

[892] *R v Doyle*, 12 ONT. R. 347, 1886.

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in those ceremonies failed by reason of the provisions of the *Règlement Intérieur*.

Constitutional issue: The applicant argued that his suspension and continued exclusion from school constituted a hindrance in the enjoyment of freedom of conscience without his consent. Therefore, it was his contention that the *Règlement Intérieur* violated Article 37 of the Constitution. The *Tribunal* held that the onus clearly was on the applicant to prove that he had been so hindered. It accepted that he had successfully discharged this burden and that he was entitled to redress in respect thereof, unless that hindrance and the law that sanctioned it came within the ambit of the Constitution.

The *Tribunal* stated that there was a presumption that the legislature acted constitutionally and that the laws that it had passed were necessary and reasonably justifiable. It said this presumption also applied to the rules made by a Principal, assisted by the Council of Teachers, under statutory powers conferred on him by the *Arrêté Présidentiel*. The applicant therefore had the *onus* of proving that the *Règlement Intérieur* was unconstitutional and that his suspension and his continued exclusion were not fair.

The *Tribunal* accepted the prosecutor's argument that it was essential to have national unity to achieve and maintain national security. Furthermore, that in a multi-ethnic society such as Rwanda ethnicity and sectionalism constitute serious dangers to national unity and thus to the security of the nation. It also accepted that, to counteract these dangers, there was need to instil a consciousness of national unity and national allegiance in the nation and that such consciousness had to be instilled in the minds of the young in particular by proper and appropriate instruction. It explained that the *Règlement Intèrieur* was expressed to be designed to that end, that for the purpose of promoting national unity..., along with... every other civilised country in the world, Rwanda had adopted a National Flag and a National Anthem as symbols of her nationhood, and that these symbols had to be acknowledged as such and treated with due respect, whence in principle a law which made proper provision was one which was reasonably required in national interests and is reasonably justifiable in a State of law.

The *Tribunal* noted that the applicant was not compelled by the State to sing the National Anthem or salute the National Flag. It continued that he was only required to do so as a condition - along with other conditions, if he wished to attend a government or state-aided school, that is to say, if he chose to accept education provided or financed by the government. This seemed to the *Tribunal* to be reasonable. It added that he was not compelled to attend a government school since education was

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not compulsory in Rwanda as it was in other countries, nor was the State under any mandate to provide education. It remarked that, although he could not look to any other comparable source of education than the *Rubengera* school because no other was available at that time, he was not, as a result, denied freedom of religion. He was free to practice his religion as he pleased. It was not really his freedom of religion which was invaded, but his freedom of education which was not a freedom guaranteed by the Constitution.

This case demonstrates the extent to which the *Tribunal* would go to support abridgement of individual rights by the State. Under the stringent tests laid down by the court it is almost impossible for an applicant to win cases against the government. Not only must he show that he has been hindered in the enjoyment of the right in question, but he must also show that the law or action in question was not reasonably required in any of the interests specified and that the law or action was not reasonably justified in a State of law.

This is a heavy burden. It is the author's contention that, once the applicant has succeeded in proving that his right has been violated, the onus of showing that the law which brought about that situation is reasonably required and also reasonably justifiable in a State of law, must rest on the State itself. This is because the facts upon which a conclusion on this aspect must be based, are peculiarly within the knowledge of the government and also because it is more difficult to prove a negative (i.e. that the law is not justified). In this regard the approach taken by the court in the *Ntagarukanwa* case[893] is much more progressive and would advance individual rights. In that case the judge placed the burden of proving that the challenged law was reasonably required in the specified interest on the State.

Furthermore, the presumption of constitutional validity in favour of a regulation such as the *Règlement Intérieur* is an unfortunate self-imposed limit on the powers of judicial review. It is the author's view that, to apply that presumption to that regulation or any statute that appears *prima facie* to violate a fundamental right protected by the Constitution seriously undermines the effectiveness of a bill of rights. The position of the individual alleging a violation of his rights would be enhanced if the presumption were reversed, i.e. that when there is such a *prima facie* violation of the fundamental right, the onus must rest upon the government to show that it is justified.

Although freedom of conscience was largely observed in practice, the record was not entirely clean. *Jehovah's Witnesses*, over the years, were subjected to harassment by government and MRND

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[893]See supra, Privacy of Home and Other Properties.

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officials and militants. They were perceived as anti-government dissidents who were implacably opposed to government policies.[894] Members of the Sect were dismissed from employment and imprisoned because of their refusal to participate in political activities.[895]

A number of pupils belonging to the sect were expelled from school for refusing to sing the National Anthem and saluting the National Flag. For instance, in 1981, at least 84 pupils were expelled from primary schools in *Gisenyi* alone.[896]

Some *Jehovah's Witnesses* were brutally assaulted and their homes burnt down by MRND members. From February through April 1981 more than 13 houses of *Jehovah's Witnesses* were burnt down by MRND members in *Gitesi*.[897]

In February 1981, the Burgomaster of *Gishyita* ordered that the preachers of the *Jehovah's Witnesses* should not be allowed to preach in that Commune unless they produced MRND cards and sang the National Anthem in front of their converts.[898] Subsequently, *Jehovah's Witnesses* who were found preaching in that Commune were beaten up by policemen.[899]

The *Jehovah's Witnesses* Sect was banned in Zaïre, Malawi and other countries in Africa. The *Witnesses* were persecuted by their governments and many of them fled to Rwanda, especially to *Kibuye* and *Gisenyi*. But the Rwandan government was not hospitable to the refugees. For example, in 1979 and 1981, a number of *Jehovah's Witnesses* came into Rwanda, from *Kivu* in Zaïre.[900] In Zaïre, the *Witnesses* had been killed, raped, beaten, and forced to walk naked by the *JMPR*, the Youth Wing of the ruling *Mouvement Populaire de la Révolution (MPR)*. Unfortunately the government declared these refugees prohibited immigrants. Many of them were elderly people, women and children.[901] They were rounded up and handed over to the Zaïrian Security forces, which

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[894]In June 1980 the Burgomaster of *Gitesi* gave the Watch Tower members a final warning to stop their anti-government activities or face the ban. So because of all this and other cautioning and ever-growing hate campaigns the present attitude of Jehovah Witnesses towards life in general was that of a "bunch of lost sheep" who were so fearful that they no longer trusted an outsider. *Mweya, Faith in the last days, at 21.*

[895]For example in March 1980 8 *Jehovah's Witnesses* were sacked by police officers because they refused to buy MRND cards. Id.

[896]Id.

[897]Ibid.

[898]Ibid.

[899]Ibid.

[900]Ibid.

[901]Ibid.

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had connived in their persecution. The Rwandan government ignored pleas by the refugees that they would be killed or persecuted in Zaïre.[902] This action by the government was inhuman and illegal under international law.

Although there was no written ban, freedom of conscience generally was restricted by the government with regard to the registration of new churches and religious organisations. The rationale for the restriction was that it would discourage the formation of undesirable sects.[903]

2.6.3.9 Freedom of movement

Article 21 guaranteed freedom of movement. This freedom meant the right to move through Rwanda, the right to reside in any part of Rwanda, the right to enter Rwanda, and immunity from expulsion from Rwanda. But a person who was in lawful custody was not entitled to this freedom.[904]

As with other rights discussed above, freedom of movement was subject to several limitations as the Constitution referred to laws to regulate this freedom. Thus, a number of laws severely curtail freedom of movement for the purpose of the interests of defence, public safety, public order, public morality or public health, or the imposition of restrictions on the acquisition or use by any person of land or other property in Rwanda. For example, regulations made by the President or his delegate pursuant to Articles 3 and 4 of the *Décret* regulating the state of emergency[905] provide for the restriction of movement and detention without charge of anyone considered to be a threat to public security. They also provide for the declaration of curfews by the President.

Moreover, laws abridging the freedom of movement of aliens and public officers were permitted.[906] Extradition of criminal fugitives was also permitted.[907]

These regulations were used extensively and in most cases improperly, as shown in section 2.6. Thousands of people were restricted or detained without trial under the regulations. The President or his delegate also declared curfews on many occasions.

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[902]A senior immigration officer at *Goma* Immigration office, told a reporter: " We send back thousands of these people every week. Every time they come back through the hills". Ibid.

[903]Ibid.

[904]Constitution, art 22; *Code Pénal,* art. 16, *Code de Procédure Pénale, art. 35-57.*

[905]See infra section three.

[906]These were especially the *Loi* of 15 October 1963, J. O., 1963, p. 472, 478; and *Arrêté Ministériel No. 3/04* of 2 January 1963, J. O., 1963, p. 23.

[907]Id. See especially art. 18, J. O., 1963, p. 472.

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Even courts favoured the denial of freedom of movement. In *Mukamabano v Etat Rwandais*,[908] the Court ruled that *Mukamabano*, being a woman, had no right to apply for a passport without authorisation given by her husband. This position was taken in accordance with the *Code Civil* according to which a married woman had to obtain her husband's authorisation for any legal matter in which she had to appear in person.[909] As the court considered the application for a passport a legal matter, its decision meant that a Rwandan married woman could not enjoy freedom of movement without her husband's consent.

The *Arrêté Présidentiel No. 25/01* of February 26, 1966 regulating the reintegration of refugees[910] imposed controls on the movement of refugees in Rwanda. Article 5 subjected their freedom of movement to prior and written authorisation of the burgomaster of the commune in which they resided.

Certain areas were designated as protected areas and were off-limit to the public, except with special permits. These included electricity power generating stations, military camps, etc.[911]

Over the years, the government restricted the freedom of movement of its political opponents by banning them from travelling abroad and confiscating their passports. In 1980, for example, at least 11 passports were confiscated and about 121 applications were turned down.[912]

2.6.3.10 Protection from discrimination

Article 16 guaranteed equality before the law without any discrimination on the grounds of race, colour, origin, ethnic group, clan, sex, opinion, religion or social position to all citizens. It is therefore clearly understood that, if persons in the same conditions were treated differently on the above-mentioned grounds, the provision establishing such discrimination would be radically unconstitutional, and so would the practice thereof.

This freedom is interesting because of the ethnic disparity in Rwanda. As will be recalled, Hutus

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[908]R.P 2571/Kig., 16/2/1977.

[909]Government of Rwanda, *Rapport National du Rwanda pour la Quatrième Conférence Mondiale sur les Femmes* (Beijing), Sept. 1995, p. 31.

[910]J. O., 1966, p. 27.

[911]See for example the *Décret* of December 15, 1953, B. O., 1954, p. 180; *Décret of June 20, 1952, in Codes et Lois du Rwanda, p. 491.*

[912]Among those who had their passports confiscated were Callixte Rukera, Théoneste Lizinde and Callixte Kanyangoga. *Interview with a former immigration officer who did not want to disclose his name, Harare, 29 September 1998.*

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were subjected to widespread ethnic discrimination, both before and during colonial rule. It was largely because of this discrimination that Hutus fought hard to dismantle the kingship, and to gain independence from Belgium.

Theoretically, abolition of discrimination based on ethnic group became one of the major priorities of the PARMEHUTU government after assuming power. The object was to desegregate all schools, hospitals, and public facilities and to eliminate the industrial colour bar. However, ethnic discrimination did not disappear but rather took the colour of discrimination on grounds of political opinion and affiliation, which, in practice, was ethnically based but now in favour of Hutus. We have seen that non-PARMEHUTU members were persecuted or denied access to certain jobs or facilities on account of political affiliation throughout the post-independence period. During the first Republic (i.e. 1962-1973) members of opposition parties such as the UNAR, mostly Tutsis, were denied their civil and political rights. They were often evicted from government, fired from jobs and harassed in many other ways (such as being prevented from travelling abroad). This discrimination against non-PARMEHUTU members was consistent with the policy promoted by President *Kayibanda* and the top leadership of the party, which was aimed at forcing people to join the ruling party. These leaders coined the slogan "it pays to belong to PARMEHUTU".[913]

The discrimination against non-members of the ruling party, Tutsis as well as Hutus, continued during the Second Republic under the MRND of President *Habyarimana* (1973-1994). MRND opponents were completely excluded from the political system. This was because, as seen, MRND membership was a *de facto* prerequisite for elective offices, top civil service jobs, and employment in the defence force. In addition, only "convinced" MRND members were allowed to head parastatals and statutory boards (which control 85% of the economy).[914]

Discrimination was also carried out against women in profound and systematic ways that subjected them to a wide array of limitations and restrictions. Although the prohibition against discrimination extended to discrimination based on gender, laws that discriminate against women, both legislative and customary, are allowed. One of the areas in which women suffer discrimination is employment. The *Code du Travail*[915] empowers the Minister of Labour to enact regulations placing restrictions on women's access to jobs such as mining. These restrictions are ostensibly aimed at preventing

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[913]MDR slogan: (...) "PARMEHUTU *yaratsinze*"(...)

[914]See The Hindrance of Civil Society.

[915]*Loi* of 23 February 1963, J. O., 1967, p. 107, as modified.

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women from being exploited and exposed to danger in heavy industrial and night work. Although there was no ministerial order determining the types of work prohibited to women, women could not be employed in industrial undertakings during the night, unless the undertaking was a family one. An industrial undertaking included mines, quarries and other undertakings for the extraction of minerals from the earth, manufacturing and building industries.[916]

The main effect of these denials was to exclude women from a large sector of formal wage employment opportunities in the country. This is because the Rwandan economy was dominated, apart from agriculture, by the mining industry. Such discrimination against women in employment not only contributed to a sex-segregated occupation structure in Rwanda (where most women work as nurses, secretaries, primary school teachers, etc.) but it also perpetuated, to a large degree, the economic dependence of women, by excluding women from some of the main employment sectors of the Rwandan economy.

It is difficult to justify this legislation in view of the fact that women in the rural areas are involved in heavy agricultural work[917] and women are employed at night in poorly-paid public service jobs such as nursing in hospitals. Another discriminatory provision hard to explain is Article 4 of the *Décret* regulating trade[918], according to which a wife could not engage in trade activity without the express authorisation of her husband.

Women have occupied an inferior legal position to men under customary law. They have been considered perpetual minors and have thereby been regarded and treated as dependent on their male relatives in several respects. First, a woman must obtain the consent of her parents or relatives to contract a valid customary marriage, regardless of her age. Second, the requirement that a man pay bride price *(inkwano)* to the parents of the woman in order to validate a customary marriage, means that the parents must consent to the marriage. The law therefore discriminates against adult women by denying them the right to marry men of their choice under customary law. Third, *inkwano* undermines the status of women with regard to divorce because *inkwano* must be repaid to the husband by a woman's relatives on dissolution of the marriage. Thus, the woman is compelled to

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[916]In reply to Ms. Agathe Ntabanganyimana's application for employment, the Director of the mine company (SOMIRWA) stressed that (...) *"l'extraction des minerais et les autres travaux y relatifs sont interdits aux personnes de sexe féminin"(...)* Letter dated November 11, 1979; even in schools pupils were taught that certain jobs such as building and manufacturing naturally were men's and, thus, prohibited to women.

[917]See for example Human Rights Watch, Shattered Lives, Sexual Violence during the Rwandan genocide and its aftermath, 1996, p. 22.

[918]*Décret* of August 2, 1913, B. O., 1913, p. 775.

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seek her parent's consent to divorce her husband. It is therefore apparent that the law discriminates against women by denying them the right to terminate a marriage in their own right.

These are but a few instances of discrimination against the Rwandan woman whose role in society has centred on her position as wife and mother. As observed by *Ntampaka*,

> ... from a young age, the education that girls receive from their mothers initiates them into their future lives as wives and mothers. A woman will take care of the house as well as working in the fields. She will learn certain kinds of behaviour, such as keeping a reserved attitude, or submission... The strength of a family is measured in [the] number of its boys.[919]

He added,

> ... the ideal image of a woman is still generally viewed through the perspective of her maternal role. The woman must be fertile, hard-working and reserved. She must learn the art of silence and reserve.[920]

This obligation to be docile has guaranteed domestic abuse: it has been reported officially that over fifty percent of Rwandan women have been victims of domestic violence at the hands of their male partners.[921] Moreover, a woman who has committed adultery is sanctioned more severely under the penal code than a man prosecuted for the same offence.[922] It is clear that there is inequality between married men and women with regard to their obligations and rights *vis-à-vis* each other's consortium (i.e. the sharing as far as possible by spouses of a common domestic life).

2.6.3.11 Protection of freedom of expression

Freedom of expression was guaranteed explicitly by Article 18, and implicitly by Article 22, which guaranteed the secrecy of correspondence and postal, telephonic and telegraphic communications. It encompassed freedom to hold opinions about any subject without interference with one's correspondence.

Freedom of expression was, however, not absolute. Article 18 permitted derogations by referring to the Acts of Parliament, regulations of the executive, protection of state security and the honour of other persons. These permitted derogations were so vague and ambiguous as to render freedom of

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[919]Ntampaka, C., La Femme et la fille dans leur famille d'origine, Kigali: Haguruka, p. 24-25, translated in Human Rights Watch, Shattered Lives, Sexual Violence during the Rwandan genocide and its aftermath, at 19-20.

[920]Id., at 20.

[921]Government of Rwanda, *Rapport National du Rwanda pour la Quatrième Conférence Mondiale sur les Femmes (Beijing), September 1995, p. 19.*

[922]Article 354 provides for imprisonment of one month to one year for the woman, and one to six months for the man.

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expression almost meaningless. Almost any regulation or practice could be made to fit within one of the derogations. They were not subjected to any single test. A serious defect in Article 18 was that freedom of the press was not expressly protected. Yet it is incontrovertible that freedom of the press is indispensable for the operation of any democratic system of government. The lack of such freedom had serious consequences in Rwanda, as will be shown later.

Several laws, regulations and practices have operated to severely restrict freedom of expression in Rwanda. The penal code[923], particularly, contains some ambiguous and interesting provisions. Article 164 provides for the death penalty for any person who undermines the person of the Head of State: "*toute personne (...) porter atteinte à la personne du Chef de l'Etat*". Article 166 prohibits sedition:

> *Quiconque soit par des discours tenus dans des réunions ou lieux publics, soit par des écrits, des imprimés, des images ou emblèmes quelconques, affichés, distribués, vendus, mis en vente ou exposés aux regards du public, soit en répandant sciemment de faux bruits, aura soit excité ou tenté d'exciter les populations contre les pouvoirs établis, soit soulevé ou tenté de soulever les citoyens les uns contre les autres, soit alarmé les populations et cherché ainsi à porter les troubles sur le territoire de la République, sera puni d'un emprisonnement de deux à dix ans et d'une amende de deux mille à cent mille francs ou de l'une de ces peines seulement, sans préjudice des peines plus fortes prévues par d'autres dispositions du présent code.*

And Article 391 sanctions defamation:

> *Celui qui aura méchamment et publiquement imputé à une personne un fait précis qui est de nature à porter atteinte à l'honneur ou à la considération de cette personne, ou à l'exposer au mépris public, sera puni d'un emprisonnement de huit jour à un an et d'une amende de mille à dix mille francs, ou de l'une de ces peines seulement.*

These provisions have a chilling effect on freedom of expression, since, because of their wide sweep, almost any criticism of the government or the President can be termed seditious or defamatory. In practice, during the *Habyarimana* government, critics of the government, including students at the National University of Rwanda, had their publications banned or declared seditious. Critics who were not detained under emergency regulations were often charged with sedition.[924] Many people who were heard to criticise the President were arrested and charged with defamation of

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[923]*Décret-Loi No. 21/77, 18 August 1977, J. O., 1978, no. 13 bis, p. 1, as modified.*

[924]For instance in 1978, Seth Sendashonga was questioned and warned by the Presidential secret police about his article in the *DIAPASON, "Le gouvernement du peuple"*, which was considered to be seditious. The article simply criticised the fact that the government was not elected. *A.J.R, May, 1978.* In 1980, Esdras Kanimba, President of the General Association of Students of the University of Rwanda *(*AGEUNR*)* was detained and tortured by the Presidential secret police for having chaired a meeting in which "political issues" were discussed.

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the President.[925] This inevitably stifles public debate on matters of national importance, as many people are too frightened to speak up. How it has hindered civil society by denying press and academic freedoms has also been shown.

Furthermore, *Ordonnance No. 53/Cont.*[926] regulating cinematographic films restricts freedom of expression by submitting the creation of cinematographic films to prior and special authorisation by the President of the Republic or his delegate. This authorisation is personal and non-transferable. Moreover, *Ordonnance No. 221/114* protecting children with regard to film projection[927] restricts freedom of expression by permitting prior censorship of films by a State appointed Control Commission.[928] The Commission is required to examine every cinematographic picture and may approve the same as suitable for exhibition to the public, or refuse to approve the same, or agree to approve the same subject to such excisions from the cinematography film as it thinks proper.[929] The Commission must refuse to give approval to any film or any part thereof "which, in its opinion, depicts any matter that is contrary to public order".[930]

It is clear that the Commission has a wide discretion to censor the content of films shown to the public. Although this power has not been used frequently, the words "public order" are not defined anywhere in the legislation, leaving it entirely to the discretion of the Commission to define them. Some films were banned because of their political content or for featuring intimate love scenes or violence. The majority of films that were not banned outright had whole scenes which the Commission found unacceptable excised.

Although there were no censorship Commissions for plays, artists in the theatre had to practice self-censorship. Although the Rwandan State was liberal compared to most African States, and did not practice open censorship of plays and productions, the habit of self-censorship on the part of playwrights and theatre practitioners in fact made its task easier. The artists were afraid of having sanctions applied if they stepped out of the MRND line. The government did little to encourage the

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[925]For example, in October 1989, a 63-year old woman, Rahab Kamashara, was charged with defaming President *Habyarimana*. The accused, a former government employee, denied the charge and said all she had done was to complain about her pension money. *R.P. 239/Kig, 15 Aug. 1982.*

[926]Ordinance No. 53/Cont., May 1, 1936, B. O. R. U., 1954, p. 443.

[927]O.R.U., No. 221/114, June 19, 1959.

[928]Id. Article 1 empowers the Minister to appoint a Control Commission. This order, a relic from the colonial days, was enacted in 1959.

[929]See art. 7 & 15.

[930]Id. Read together with Order No. 221/4, January 7, 1960, art. 1.

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development of theatre in the country. This can be evidenced by the fact that there is no functioning arts centre and no national theatre, that the government has not even built one theatre house and that theatre itself has almost disappeared.

2.7 Emergency laws in practice

A state of emergency can be defined as

> "An exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the organised life of the community of which the State is composed."[931]

Emergencies are mostly due to war, internal subversion (including secession and insurrection); and a breakdown, or potential breakdown in the economy.[932] Other emergencies are caused by riots, natural catastrophes such as fires and floods, earthquakes, and strikes in strategic services and industries. What distinguishes the second category from the first is that the latter are often localised, temporary and normally counteracted by the normal or customary powers of the government.

It is undeniable that every sovereign government must possess effective means to deal with emergency situations and must reconcile the apparent necessities evoked by danger with the protection of human rights.[933] The exercise of emergency powers inevitably impinges on individual rights. Three important questions need to be addressed. First, in what circumstances and subject to what safeguards would individual rights succumb to the claim of emergency powers by public authorities to preserve national security? Second, should every threat to the State, whether real or imaginary, justify derogation from legal protection of individual rights? Lastly, what can be done to ensure that emergency powers are not abused, for example to cover up police inefficiency or as a treat against rivals, or simply as a method of personal harassment?

Not all "emergencies" justify an official state of emergency and the suspension of fundamental rights. "Only those which threaten the life of a nation require exceptional measures. The best way to

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[931] *Chodwrury, S.R.*, Rule of law in a state of emergency: The Paris Minimum Standards of Human Rights Norms in a State of Emergency (1989), p. 11. This definition is given by the International Law Association which approved a set of minimum standards governing the declaration and administration of states of emergency that threaten the life of the nation, at its 61st Conference held in Paris from August 26 to September 1, 1984. These standards, known as the Paris Minimum Standards of Human Rights Norms in a State of Emergency, are designed to help ensure that even in situations where a *bona fide* declaration of a state of emergency exists, the State concerned will refrain from suspending non-derogable rights under article 4 of the International Covenant on Civil and Political Rights.

[932] Kavaruganda, J., Droit Judiciaire, Butare: UNR, 1982, p. 12.

[933] Groves, H., Comparative constitutional law: cases and materials, 1963, p. 189.

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prevent abuse of this power and unlawful infringement of fundamental rights is to provide for comprehensive constitutional checks in such situations. In times of emergency the protection of fundamental rights becomes all the more important. In a democratic constitutional State, an emergency clause must exist which may only be implemented under the control of a supreme Constitution which provides for extensive judicial and legislative controls". [934] The absence of such a provision in a constitution is no guarantee that exceptional powers will not be invoked. Even countries without explicit derogation clauses in their constitutions sometimes find it necessary to invoke emergency powers.[935] "Such measures are then justified by invoking 'implied provisions', prerogative powers, martial law, the principle of *salus reipublicae suprema lex*, or the right of the State to self-defence, or necessity".[936] In most African countries, the most used "implied provisions" are those relating to the *salus reipublicae suprema lex*. In this regard, it has been argued by some that it is only when the safety of the State is assured that individual rights can be realised.[937] According to this argument, the rights of the State must take precedence over individual rights whenever the stability of the State is threatened. The danger is that this ground may suggest some "extra-constitutional" source of executive power that is beyond normal constitutional and judicial control. There are nevertheless minimum international standards that must be complied with. In this connection reference must be made to salient provisions of the International Covenant on Civil and Political Rights.[938]

Article 4 (1) permits State parties, during times when an emergency declaration is in force, to take measures derogating from individual rights to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. However, a State may not derogate from the following rights and freedoms[939]: the right

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[934] Erasmus, Limitation and Suspension, 1994, at 629.

[935] See the US case of Korematsu v United States 323 US 214 (1945), where it was stated, per Frankfurther J: 'Therefore the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless'.

[936] Erasmus, Limitation and Suspension, 629.

[937]For example Kavaruganda stated that the rights of the individual depend for their very existence and implementation upon the continuance of the organised political society - that is - the ordered society established by the Constitution. He contended that the continuance of that society itself depends upon national security, for without security any society is in danger of collapse or overthrow. He concluded that national security is thus paramount not only in the interests of the State but also in the interests of each individual member of the State; and measures designed to achieve and maintain that security must come first, and subject to the provisions of the Constitution, must override, if need be, the interests of individuals and of minorities with which they conflict. Kavaruganda, J., Droit Judiciaire, Butare: UNR, 1984, p. 141.

[938]Villan Duran, The Universal Declaration of Human Rights, 1998.

[939]Article 4 (2).

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to life (art. 6); freedom from torture or cruel, inhuman or degrading treatment or punishment (art. 7); freedom from slavery or servitude (art. 8); freedom from being imprisoned merely on the ground of inability to fulfil a contractual obligation (art. 11); the right to recognition everywhere as a person before the law (art. 17); freedom of thought, conscience and religion (art. 18); and the right not to be tried on any criminal offence which did not constitute a criminal offence under national or international law, at the time when it was committed (art. 15). Moreover, Art. 5 of the International Covenant on Civil and Political Rights stipulates that a State party may "engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the Covenant."

In addition to the provisions of the International Covenant on Civil and Political Rights outlined above, reference will also be made to the Paris Minimum Standards of Human Rights Norms in a State of Emergency.[940] These norms offer an international standard against which the Rwandan legislation will be compared. The legislation in question is governed by the 1959 *Décret,*[941] its executory *ordonnance,*[942] and the *dispositions spéciales* (special provisions) of the *Code de Procédure Pénale*.[943] As seen in Chapter one, the 1959 *décret* was enacted as a result of the *jacquérie* in which many people, mostly Tutsis, lost their lives. To date, this *Décret* is still in force and states of emergency have been declared whenever there was fear, real or imaginary, of coup d'état or Tutsi attacks during the Hutu rule, and of Hutu infiltrators during the Tutsi rule. Unfortunately there has never been an explicit provision on states of emergency and the suspension of fundamental rights in the Rwandan Constitution. Article 13 only reads: *"Nul ne peut être soumis à des mesures de sûreté que dans les cas et les formes prévus par la loi, pour des raisons d'ordre public ou de sécurité de l'Etat".* This section will examine the manner in and extent to which emergency powers were used during the three post-independence regimes: Were emergency powers used legitimately to deal with real threats to public security? Were they used for the primary purpose of eliminating political rivals, suppressing dissent, covering up police inefficiency or simply in personal vendettas? What were the effects on the human rights culture in Rwanda, especially the culture of impunity? To what extent did they perpetuate or change the predominant and colonial legacy for the worse? To what extent were they used to (or resulted in) exacerbation of ethnic rivalry?

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[940]Reprinted in Villan Duran, The Universal Declaration of Human Rights, 1998.

[941] B.O.R.U., 1960, p. 759.

[942] *Ordonnance* No. 11/630 of 10 December 1959, B.A., 1959, p. 3259.

[943] Code de Procédure Pénale, Loi of 23 February 1963 (J.O., 1963, p. 98) as modified (J.O., 1986, p. 155), Codes et Lois du Rwanda, Vol. II, 2nd edition, 1995, p. 561, articles 146-149.

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The power to detain or restrict without trial was used extensively by successive regimes. The author contends that this power was used improperly in a majority of situations. Moreover, the author argues that, during several periods, the semi-state of emergency was sustained, not for the preservation of public security as the Executive claimed, but for the preservation of the successive ruling parties and their strongmen. During the Hutu regimes, emergency power was used to persecute Tutsis and Hutu political opponents. Many of the so-called threats to public security that were dealt with through the use of emergency powers could easily have been countered through ordinary law.

2.7.1 Legal basis and abuse of emergency powers in Rwanda

In Rwanda, as in many other countries, the *sine qua non* for the operation of emergency laws is the existence of a state of emergency. The provisions relating to the proclamation of a state of emergency remained unchanged during the period under study. The emergency statutes empowered the President or his delegates to make regulations for the preservation of public security. Amongst these regulations may be those providing for entering and searching of premises[944]; detaining and restricting people without trial;[945] prohibiting, restricting and controlling association, assembly[946] and publication;[947] suspending delivery of correspondence and other services;[948] and taking possession or control of any property or undertaking;[949]and any such regulation deemed necessary for public security or the conducting of operations.[950] Under the *Code de Procédure Pénale,* the President may make regulations to provide for the extension of *ratione loci* competence of jurisdiction as he determines and the *ratione materiae* competence of cantonal tribunals.[951]

However, the statutes do not provide for the duration of emergency regulations and, unlike in many countries, there is no guarantee that only emergency regulations that have been affirmed by a

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[944]1959 *Décret,* art. 4, 1°, a.

[945]Id., art. 4, 1°, b.

[946]Id., art. 4, 2°, a, c.

[947]Id., art. 4, 2°,b.

[948]Id., art. 4, 3°,b & 4°.

[949]Id., art. 4, par. 3.

[950]Id., par. 3 & 4.

[951]*Code de Procédure Pénale,* art. 148, par. 1.

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resolution of the National Assembly will take effect during an emergency.[952] This failure suggests that the President and his delegates have broad power to infringe individual rights by enacting emergency regulations that are therefore valid by themselves.

All the successive constitutions[953] provided that no one could be subjected to security measures, except in cases and forms provided by the law for the reasons of public order and the security of the State. Article 1 of the *Décret* empowered the *"Gouverneur Général"* to declare either that a full state of emergency was in existence or that a threatened state of public emergency was imminent (i.e. a semi-emergency). As the functions of the *"Gouverneur Général"* were exercised by the *"Président de la République"* after independence, the power to declare the state of emergency was vested in the President of the Republic.[954] However, the *Décret* was silent about the publication of the state of emergency and implicitly made the state of emergency a reserved domain of the executive by not providing for parliamentary approval and / or control and not determining the duration of the state of emergency.

In enhancing Executive power, and correspondingly excluding the power of the National Assembly, Rwanda followed in the footsteps of countries like Malawi which had amended its Independence Constitution to reduce or eliminate Parliamentary control over the executive's use of emergency powers.[955]

The provisions of the 1959 *Décret* were not in conformity with acceptable international standards, of which the most famous are the Paris Minimum Standards of Human Rights Norms in a State of Emergency.[956] According to the Paris Minimum Standards, the following norms must be adhered to in order to ensure that the legislature can enforce accountability of the executive branch which assumes or exercises emergency powers: the duration of the emergency shall never exceed the period strictly required to restore normal conditions; the duration of the period of emergency (save in the case of war or external aggression) shall be for a fixed term established by the Constitution; and every extension of the initial period of emergency shall be supported by a new declaration made

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[952]For example, section 37, (11) of the South African Constitution and article 30, (2) of the Zambian Constitution provide that only emergency regulations that have been tabled and affirmed by a resolution of the National Assembly shall take effect during an emergency.

[953]Self-government Constitution, art. 13 & 14; one-party Constitution, art. 13; 1991 Constitution, art. 13.

[954]Basomingera, Introduction au Droit Constitutionel, at 43.

[955]The Provisions relating to the declaration of a state of emergency in the independence Constitution of Burundi were similar to those contained in the *1959 Décret*. Regarding Malawi, no provision was made for the declaration of a state of emergency in the Republican Constitution of 1966.

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before the expiration of each term (i.e. with the prior approval of the Legislature) for another period to be established by the Constitution. A strict scrutiny, by the legislature, of every extension of the period of emergency is imperative; prior approval is essential since the reason of urgency that might have justified the initial declaration by the Executive is no longer relevant. Emergency provisions in the Rwandan *Décret* fell short of these norms. The first state of emergency during the post-independence period was declared by President *Kayibanda* on 21 December 1963, as a result of the *inyenzi*[957]attack from Burundi, as the UNAR leadership in exile in that country had decided to strike a decisive blow against the republican regime.[958] After *Kayibanda,* intelligence services were informed of the attack, the State radio repeatedly beamed emergency warnings, asking the population to be 'constantly on the alert for Tutsi terrorists'.[959] In this atmosphere of intense fear, saturated with rumour and suspicion, the worst was bound to happen. At the root of the tragedy lies President *Kayibanda*'s decision to entrust each of his cabinet ministers with emergency powers in each of the ten local prefectures, with instructions to take whatever measures they deemed appropriate.[960] In many cases, this mandate was interpreted as a licence to kill: the first reaction of the authorities was to round up and jail some twenty leading Tutsi personalities associated with the local branches of the UNAR and RADER parties, some of whom figured in the list of potential ministers. Less than a week later they were all taken to *Ruhengeri* and summarily executed.[961] Simultaneously, steps were taken to organise civilian 'self-defence' groups among the Hutu population, to counter possible attempts at internal subversion. In this regard, primary responsibility was placed upon the burgomasters and the prefects. In addition, one minister was assigned to each of the ten prefectures - now converted into "emergency regions" - to supervise the organisation of the self-defence units.[962] These arrangements were made within a few hours, in an atmosphere of panic, and therefore with little attention to procedural detail or co-ordination. Addressing an improvised meeting of burgomasters and PARMEHUTU propagandists, a certain *André Nkeramugaba*, prefect of *Gikongoro*, is reported to have said, "We are expected to defend ourselves. The only way to go about it is to paralyse the

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[956]See Kavaruganda, Droit Judiciaire, at 192.

[957]Literally meaning "cockroaches", the term *inyenzi* was used both within and outside Rwanda to refer to small-scale, Tutsi-led guerrilla units trained and organized outside Rwanda and varying in size from about six to twelve men.

[958] The decision was taken during a meeting held in Bujumbura on 11 November 1963. In fact, the *inyenzi* leaders had hoped to organise simultaneous attacks from at least four different quarters: from the regions of Kabare (Uganda), Ngara (Tanzania), Goma (Congo), and Ngozi and Kayanza (Burundi). See Lemarchand, Rwanda and Burundi, at 219.

[959] Id., at 223.

[960] See Circulaire 12/63, 21/12/1963.

[961] Lemarchand, Rwanda and Burundi, at 223.

[962] Circulaire 12/63, 21/12/1963.

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Tutsis. How? They must be killed".[963] In this prefecture alone, an estimated 5,000 Tutsis were massacred.[964] Soon, the contagion spread to other areas.[965]

Whenever Tutsis attacked, a state of emergency was declared during which many innocent people lost their lives. Besides, the most important effects of the Tutsi attacks and subsequent states of emergency policy had been to strengthen ethnic divisions, and the personal power of the President. Indeed, the Hutu republic took on a strange tinge since, in many ways. The President was in fact the *Mwami* of the Hutus and his will was law. The same style of leadership applied, and his deliberate remoteness, absolutism and secretiveness unavoidably recall what *Maquet* wrote of the leadership style of the old kings:

> The role of the ruler was a mixture of protection and paternalistic profit. ... The subject was expected to fit within this form of leadership. He was supposed to adopt a dependent attitude. Inferiority is the relative situation of a person who has to submit to another in a defined field. But dependence is inferiority extended to all spheres of life. When the ruler gives an order, he must be obeyed, not because his order falls into the sphere over which he has authority, but simply because he is the ruler.[966]

This unquestioning obedience was to play a tragic and absolutely central role in the unfolding of the 1994 genocide which was perpetrated during a state of emergency declared by the Minister of the Interior just after the death of President *Habyarimana*.[967]

One of the results of states of emergency was to strengthen the culture of impunity for Rwandan authorities. The best proof is supplied by *Kayibanda*'s reaction to the report of the commission of inquiry set up at the request of the Swiss government, partly in response to the accusations made by *Denis Vuillemin*, a Swiss-appointed investigator.[968] As a result of this investigation - conducted under

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[963] Quoted in Lemarchand, Rwanda and Burundi, at 225.

[964] That the reprisals should primarily have been in this area is not accidental. Besides having a very high density of Tutsis, the Gikongoro prefecture was the core area of the Tutsi opposition, a fact that is not altogether unnatural if one considers that it also contained within its boundaries the former royal residence of Nyanza. In an effort to weaken the Tutsi opposition, the Rwanda government had decided to break the former prefecture of Nyanza into two separate administrative units, one of which became known as the Gikongoro prefecture. But this did not prevent the Tutsi of Gikongoro from continually and defiantly expressing their hopes of returning to power. Under the circumstances one can better understand why the Hutu population should have been driven to such extremities.

[965] As reported by Claire Sterling in "Chou-en-Lai and the Watutsi", *Reporter*, March 12, 1964.

[966] *Maquet*, Le Système des relations sociales dans le Rwanda ancien, at 186-7.

[967]Communiqué du Ministère de la Défense, 6 April 1994, 3.00 a.m; Communiqué du Ministère de l'Intérieur, Radio Rwanda, 6 April 1994, 5.00 a.m.

[968] In February 1964, the head of the Swiss technical assistance program, Auguste Lindt, informed President *Kayibanda* that his government would discontinue its aid to Rwanda unless an investigation was undertaken. It was largely in response to this that the first commission of inquiry was appointed. The findings of the second commission of inquiry are contained in the White Paper released by the Rwandan authorities in March 1964, misleadingly entitled *Toute la Vérité*

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the auspices of the *Procureur de la République, Tharcisse Gatwa* - no less than 89 persons were found guilty, including two ministers, and a number of local officials, prefects and burgomasters. *Kayibanda* refused to acknowledge the evidence and ordered a new investigation. This time, as one might have expected, only a handful of individuals were incriminated. Most of them received light prison sentences. At this point the matter was laid to rest.[969]

Regarding the Second Republic, following rumours of a potential *coup d'état* in April 1980, President *Habyarimana* declared a semi-state of emergency during which *Théoneste Lizinde*, former Director General of the intelligence service, and about thirty others, were arrested and detained for allegedly preparing to overthrow the government on April 23, 1980. They had allegedly recruited an indefinite number of men from the regular armed forces.[970] While in detention, they were tried in the *Cour de Sûreté de l'Etat* on November 25, 1981, which convicted them of *"atteinte à la sûreté de l'Etat"*. Thoroughly unsatisfactory evidence adduced by the prosecution resulted in the acquittal of 24.[971] Despite their acquittal, 21 of those 24 were not released from detention until May 8, 1989, after 8 years in detention.[972]

Emergency powers were also used against alleged members of alleged rebellions. Following the RPF attack on October 1, 1990, a curfew was declared by the Minister of the Interior. Using a fake attack on Kigali as a pretext, government soldiers, gendarmes and *officiers de police judiciaire* launched a massive wave of arrests.[973] It soon became obvious that these arrests did not actually target supporters of the rebel movement,[974] but indiscriminately swept up educated Tutsi, opposition-minded Hutus, anyone who was in the bad books of the power élite and even their friends or business connections, and foreign African residents, mainly Zaïrians and Ugandans. Businesses were confiscated.[975] Outside prisons, MRND activists terrorised, looted and raped civilians they

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sur le Terrorisme Inyenzi au Rwanda, Kigali, n.d.

[969] Lemarchand, Rwanda and Burundi, at 226.

[970]Agence Rwandaise de Presse, 18 September 1981.

[971]Id., 26 Nov. 1981.

[972]S.O.S Prisons, 1989, p. 2.

[973]On October 9, the Minister of Justice, Theoneste Mujyanama, admitted the arrest of about 3,000 people. The real numbers were soon to swell to nearly 10,000, some of them being held till April 1991. There were very few charges and almost no trials. See Fédération Internationale des Droits de l'Homme, Rwanda: Violations massives et systématiques des droits de l'homme depuis le 1er October 1990, Paris, 1993, p. 14.

[974]The alleged supporters were very few and even these very few were not all known to the police. See Prunier, The Rwanda Crisis, at 108.

[975]Kiesel, V., 'Une épuration qui ne vise pas que les Tutsi' *in Le Soir*, 9 October 1990; Reyntjens, L'Afrique des Grands Lacs en crise, at 95-6. Conditions of detention were terrible, people were herded like cattle into buildings unsuitable for

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considered to be spies, as Justice Minister, *Théoneste Mujyanama*, had declared

> There is cast-iron proof of guilt against all those who have been arrested ... and ... as far as public security is concerned, to be released does not mean that one is innocent.[976]

On the national radio, the Minister of Defence asked the population to "track down and arrest the infiltrators".[977] Between 1 and 11 October, about 400 people were killed and 500 houses burned in *Gisenyi*.[978] At a press conference, President *Habyarimana* explained,

> Civilians? Why should we kill civilians if they are not involved in the fighting and breach of public security? ... We are in war, a state of emergency has been declared. There is no revolt. Everybody is obeying ... .[979]

2.7.2 Judicial review of emergency declaration

The question to be determined here is whether the judiciary can pronounce on the validity of an emergency proclamation and also whether the measures taken to restore normalcy were permissible in law. As the power to declare an emergency is a presidential prerogative, the President was the sole judge of the existence of the conditions that justified the exercise of power. An obvious drawback in Rwandan legislation was that what constituted an emergency, apart from war, was not defined. The natural meaning of the word "emergency" can cover a very wide range of situations and occurrences. It is, to use *Dunedin*'s words, "something that does not permit any exact definition: it connotes a state of matters calling for drastic action...".[980] The executive, therefore, is likely to lapse into arbitrariness and violate fundamental rights and freedoms without a judicial review of the declaration of the emergency. The question of the justifiability of the power to declare an emergency

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holding such large numbers. They were not given food or water for several days. Beatings, thefts and rapes were commonplace; some of the prisoners were beaten to death simply because they happened to do something that displeased a drunken guard. *Prunier, The Rwanda Crisis, at 109.*

[976]Nsengiyaremye, The unknown tragedy, at 93.

[977]Radio Rwanda, News bulletin, 10 October 1990, 4 p.m.

[978]Association Rwandaise pour la Défense des Droits de la Personne et des Libertés Publiques, Rapport sur les Droits de l'Homme au Rwanda, Kigali, 1992, p. 101-16.

[979]Translated in Prunier, The Rwanda Crisis, at 110, and in Nsengiyaremye, The unknown tragedy, at 94.

[980]Justice Lord Dunedin in *Bhagat Singh v King Emperor*, L.R. 58 I.A. 169. Under the Constitution of Ghana a state of public emergency is defined as including any action that has been taken or is immediately threatened by any person or body of persons: (a) which is calculated to deprive the community of the essentials of life; or (b) which renders necessary the taking of measures which are requisite for securing the public safety, the defence of Ghana and the maintenance of public order and supplies and services essential to the community. *Constitution of Ghana, par. 33 (9)* Under the Constitution of South Africa, a state of emergency may be declared only in terms of an Act of Parliament, and only when (a) the life of the nation is threatened by war, invasion, general insurrection, disorder, natural disaster or other public emergency; and (b) the declaration is necessary to restore peace and order. *Constitution of South Africa Act No. 108, 1996, Section 37 (1).*

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unfortunately was not explored by Rwandan courts. It only arose indirectly in *Ministère Public v Lizinde*[981], where the defendant contended, *inter alia*, that the use of emergency powers to detain him exceeded anything which might reasonably have been deemed necessary. The court, upholding the detention, held that it was not open to the courts to debate whether it was reasonable for a declaration under the 1959 *Décret* to be in existence.

Unfortunately, since this was a peripheral issue merely, it was not fully examined by the *Cour de Sûreté de l'Etat*. But in Nigeria the courts had an opportunity to deal directly with the question whether the declaration of an emergency was justiciable. Under the Nigerian Constitution of 1963, the power to declare an emergency was vested in Federal Parliament. In *Williams v Majekodumni*[982], Chief Justice *Ademola* stated that

> ... a state of emergency exists in Nigeria is a matter apparently within the bounds of Parliament, and not one for this court to decide. Once that state of emergency is declared, it would seem that according to the Constitution, it is the duty of the government to look after the peace and security of the State, and it will require a very strong case against it for the court to act.[983]

Even outside Africa there is no consensus regarding the competence and propriety of the judiciary to pronounce on the validity of the proclamation of an emergency. For example, the International Commission of Jurists (IC), while acknowledging the position that it is "axiomatic that, for the protection of human rights, the greatest possible degree of judicial control should be striven for", commented:

> However, it is widely thought that the executive and legislature, the political branches of government are entitled to discretion in determining the existence and gravity of a threat to the nation, i.e. the need for a state of emergency, and the necessity for recourse to specific measure. Whether judicial review of these two decisions is advisable is, therefore, another issue that must be decided in the light of the legal traditions of each country.[984]

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[981]Agence Rwandaise de Presse, 25 September 1981.

[982](1962) 1 ALL NLR 328.

[983]Id., at 336. In *Adegbenro v Attorney General*, Justice Ademola stated: "We however, feel that on the question whether or not there were sufficient grounds for Parliament to declare a state of emergency, it is unnecessary for us to rule on the submission that if Parliament acted *mala fide* in making a declaration of a state of public emergency the court could hold invalid, since it is impossible to say in the present case that there was no ground to justify a declaration, it is not for this court to go outside the provisions of paragraph 65 (3) of the Constitution of the Federation defining emergency". *(1962) 1 ALL NLR 338-48.* An almost identical set of facts existed in the Malaysan case of *Ningkan v Government of Malaysia* (1969) 2 W.L.R 365, decided by the Privy Council. In that case, the Privy Council stated categorically that the power to declare an emergency was the sole prerogative of the Federal government, and therefore could not be questioned in any court of law.

[984]International Commission of Jurists, States of Emergency: Their impact on human rights 435 (1983). At a United Nations Seminar held in Kingston, Jamaica, there was general agreement that the 'declaration of a state of emergency should not be subject to judicial control.' Seminar on the Effective Realisation of Civil and Political Rights at the National Level, Kingston, Jamaica, UN Doc. ST/TAO/HR/29, par. 237 at 51 (1967).

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After having studied the case law of eight countries - United States of America, United Kingdom, Canada, South Africa, Ireland, New Zealand, Australia and India - Alexandra concludes that courts are vulnerable in times of national crisis and that "in the most serious cases, courts have performed badly, will necessarily continue to perform badly and should ideally not be involved."[985] He asserts that, in the United States of America and other countries, the courts have upheld, with few exceptions, "far-reaching expansion of governmental power with corresponding contraction of individual rights during times of public emergency."[986] Regarding the justiciability of a declaration of emergency, he found that the preponderant view is that the judgement of the political branches of government, with a few exceptions, are outside the purview of judicial review.[987]

Given the practice in other jurisdictions it is not hard to predict that, if Rwandan courts were confronted with a case that required them to pronounce on the validity of a declaration of an emergency, they would probably have declined to do so. Moreover, the absence of a definition of "*exception*"[988] in the 1959 *Décret* and the fact that Article 1 required only the President's subjective satisfaction before he could declare an emergency, made it highly improbable that the courts would review his action. This state of affairs, coupled with the lack of parliamentary check, is indeed unfortunate as it creates a situation where emergency powers are easily abused. It is not inconceivable that an emergency can be declared even when *prima facie* conditions for an emergency do not exist.

The absence of judicial review of the merits of a declaration of a state of public emergency constitutes a grave threat to guaranteed rights because certain rights (e.g. to life, freedom of movement, assembly, expression, liberty) are curtailed during an emergency.

2.7.3 Ambiguity of '*sécurité publique*'

Although the purpose of the regulations made pursuant to the emergency statutes is the preservation of public security, the three statutes do not precisely define the words *"sécurité publique"* or *"sûreté de l'Etat"* contained therein. The penal code itself, under the subsection on the *"atteintes à la sûreté de l'Etat"* (acts of conspiracy against the security of the State) restricts itself to

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[985]Alexander, The illusory protection of human rights by national courts during periods of emergency, 5 Hum. RTS: J, 1-65, (1984).

[986]Ibid.

[987]Ibid.

[988]The state of emergency in the 1959 *Décret* is called *"état d'exception"*.

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enumerating these acts, without defining them, and to determining their punishment. However, *"sûreté de l'Etat"* is not defined anywhere and Rwandan case law is silent on the matter, which, in some ways, opens the door to arbitrariness.

In some countries, courts have attempted to interpret 'public security'. A more enlightened definition was given by Judge *Cullinan* of the Zambian Supreme Court in *Kaira v Atn. Gnl*[989] over a detention for economic crimes alleged to have troubled public security. He said:

> The words "public security" in their ordinary sense surely mean the securing of the safety of all persons and property and the preservation of law and order. It can be said that the last four objects stated in the definition supplement the first object. Thus, in order to protect the safety of persons and property it is necessary to maintain supplies and services essential to the life of the community, to prevent public disorder, or subversive activities, or indeed a breakdown of law and order. The emphasis, in the view of the court, is on the preservation of the safety of the community, rather than on its economic prosperity or otherwise. There may well be a nation whose economy is little short of chaotic but the peace and safety of whose citizens is never in doubt.[990]

Under this approach, the executive can only resort to emergency regulations when the security of the entire community is threatened and the ordinary law has proved inadequate to cope with the situation. Emergency powers should not be used to deal with isolated crimes of any kind that have little connection with the peace and safety of the community as a whole.

The lack of definition of "*securité publique"* and "*sûreté de l'Etat*" and the weakness of judicial review in Rwandan law and in practice contributed to rampant abuse of powers of detention. As indicated, the *Habyarimana* regime had used these powers extensively. The expression "public security" was given the widest interpretation imaginable. The most important factor is that the presidential regimes in Africa are more sensitive about national security than any other. In Africa, "concentrated power is very sensitive to criticism and very jealous and suspicious of rivals or competition, hence the increasing predominance of the one-party system in presidential regimes."[991] In these regimes, "the

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[989](1980) ZR 65. In this case the applicant was detained for having allegedly externalised 500,000 kwacha and for an alleged attempted externalisation of a further 150,000 kwacha. President *Kaunda* subsequently told the press in an interview that he had ordered the detention of the applicant because ROP (1975) Ltd., a State-owned company, had unlawfully paid him 200,000 kwacha. The applicant contended, *inter alia*, that his detention was invalid as the grounds for his detention were not relevant to the preservation of public security. The court broke up the definition as set out in Section 2 into five groupings: (I) the securing of the safety of persons and property; (ii) the maintenance of supplies and services essential to the community; (iii) the maintenance of public order; (iv) the maintenance of the administration of lawful authority; and (v) the maintenance of the administration of justice.

[990]Id., at 82. Judge Cullinan's well-reasoned judgement was cited with approval in many other cases E.g. 1987/HN/168 (unreported). In this case the applicant was detained on grounds that he had indulged in illegal trafficking and smuggling out of Zambia of "large emeralds". See also 1981/HN/713 (unreported).

[991] Nuabueze, B.O., Presidentialism, at 298.

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president is a personal ruler, thus given a personal dimension, too. It involves not only the security of the State and its institutions, but also the security of the President's tenure of office. Anything that threatens the security of his continuance in office is also a threat to the security of the nation. He is the symbol of the nation, and the instrument through which this personal identification is achieved is the single or dominant party. A threat to the security of the party is therefore viewed as a threat to the security of the nation. Herein, therefore, lies the underlying reasons for the sensitive concern for national security in presidential regimes."[992]

Although the interpretation of the Constitution and statutes is often a complex undertaking, especially when matters of State security are involved, the bottom line is that it is quite unacceptable to subject individual freedoms to such severe limitations and restrictions during a public emergency as to render them meaningless. Thus, there must be "limits to limits". Amongst other principles to be considered to achieve this is the principle of "proportionality", originally developed by the French *Conseil d'Etat* and widely used in Europe. It refers to the constitutional limitation of the power of the State in legislation as well as administrative action. Interference with constitutional rights is only possible if (a) permitted by the Constitution; (b) capable of achieving its purported objective; (c) necessary to achieve such purported objective in the sense that no lesser form of interference is available; and (d) reasonable or proportional in the sense that the purported objective of such interference is as such lawful, adequate, necessary and of superior or equal weight when balanced against the affected right. These questions are asked in relation to the facts of every case and every right when there is a limitation and a challenge. Thus, *Orucu* asserts that the proportionality principle is the ultimate test for justice and a requisite concretisation of the rule of law and is thus immanent in the concept of basic rights.[993]

2.7.4 Ordinary criminal law and preventive detention

Does the detaining authority have power to detain where the offence falls under criminal law or where the accused has been acquitted on criminal charges? This question first arose in *Re Kayumba & Munyandamutsa*[994], where it was submitted by the petitioners, *inter alia*, that the discretion to detain was exercised in bad faith because the grounds for detention constituted criminal offences for which a criminal prosecution could be instituted. Dismissing this submission, the Tribunal stated *inter*

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[992]Ibid.

[993] Orucu, C., 'The Core of Rights and Freedoms: The Limits of Limits' in Campbell, T. (ed.), Human Rights: From Rhetoric to Reality, Oxford: Blackwell, 1986, p. 45.

[994]RP 886/90.Gis.

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alia that:

> ... detention or restriction without trial is, by definition, intended for circumstances where the ordinary criminal procedure is regarded by the detaining authority as inadequate to meet the particular situation. There may be various reasons for the inadequacy; there may be insufficient evidence to secure a conviction without disclosing sources of information which it would be contrary to the national interest to disclose; or the information available may raise no more than a suspicion, but one which someone charged with the security of the nation dare not ignore, or the activity in which the person concerned is believed to have engaged may not be a criminal offence, or the detaining authority may simply believe that the person concerned, if not detained, is likely to engage in activities prejudicial to public security. And one must not lose sight of the fact that there is no onus on the detaining authority to prove any allegation beyond reasonable doubt, or indeed to any other standard, to support any suspicion. The question is purely for his subjective satisfaction.[995]

This decision was followed in *Re Sabakunzi*[996] in which the Tribunal also ruled in favour of the subjective satisfaction of the detaining authority.

These decisions undoubtedly further accentuated the harshness of detention since the detaining authority was given the green light. Thus, a person who was found innocent by the courts could still face detention on exactly the same set of facts. The courts, by taking this position, abdicated their responsibility to be a sentinel of individual liberty. One sad result of this was that the police had no incentive to conduct thorough investigations during the period under study, because they knew that they could resort to preventive detention at any time.[997]

As regards the safeguards available to detainees, the *Service Pénitentiaire du Rwanda* order of 1961[998] permits the detainee to wear his own clothing[999]; receive and write letters [1000]; receive and read books [1001]; exercise daily[1002]; provides that the detainee shall receive a normal daily diet[1003]; allows visitors to visit him[1004]; and his attorney to visit him.[1005] Only convicted detainees may be

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[995]Author's translation.

[996]RP 1019/92.But.

[997]In their report, Kanyarwanda deplored the way in which detention was abused and was becoming alarming. Kanyarwanda, *Rapport sur les droits de l'homme*, February, 1992.

[998]Ordonnance No. 111/127 of 30 May 1961, B.O.R.U., 1961, p. 951 as modified.

[999]Id., art., art. 24, par. 3.

[1000]Id., art. 51.

[1001]Id., art. 54.

[1002]Id., art. 33, par. 1.

[1003]Id., art. 35.

[1004]Id., art. 50, par. 1.

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compelled to perform labour.[1006]

During the period under study there, unfortunately, was no court case by which one would be able to assess whether the safeguards outlined above were mandatory or not and what the effect of non-compliance with them was. The safeguards were not respected in many places of detention, which could be overcrowded prisons, soccer stadiums, private houses and other clandestine places. What is more, the legislation never provided for damages or compensation for unlawful detention and for torture and inhuman and degrading treatment.

2.8 A non-independent judiciary and an inadequate legal profession

Neither the judiciary nor the legal profession has been a strong defender of human rights and the rule of law in post-colonial Rwanda. In this section, the argument is that the denial of human rights and the rule of law are partly due to the lack of independence of the judiciary from other branches of government. This, together with other important reasons, will explain why the judiciary has been ineffective in protecting human rights. Moreover, the legal profession has been woefully inadequate in the promotion and protection of human rights, mostly because of the lack of an organised bar and the inadequacy of the education and training of lawyers.

2.8.1 Independence of the judiciary

In a democratic society the independence of the judiciary is firmly upheld. This signifies, in the words of *Beinart*, that:

> The law-deciding and law-applying agency must be one in which those whose rights are affected will have confidence, that is confidence that the agency will administer justice according to law and will do so impartially, predictably, fearlessly and as far as possible uniformly - free of outside pressure, governmental, legislative or otherwise.[1007]

This assertion suggests that every judge is free to decide matters before him in accordance with his assessment of the facts and his understanding of the law, without any improper influence, inducements, or pressures, direct or indirect, from any quarter or for any reason; and that the Judiciary is independent of the executive and legislature, and has jurisdiction, directly or by way of

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[1005]Id., art. 50, par. 3.

[1006]Id., art. 40.

[1007] Beinart, B., "The Rule of Law" 1961 *Acta Juridica III*.

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review, over all issues of a judicial nature.[1008]

The fact that human rights can be protected by an impartial and independent judiciary has been recognised in many national constitutions and international human rights instruments such as the International Covenant on Civil and Political Rights and the African Charter of Human and Peoples' Rights.[1009]

However, Rwandan law, both on the books and in practice, shows that the judiciary has not been independent. Analysis can be focused on procedures for appointment, discipline and removal of judges, security of tenure and immunity of judges. Since prosecution is also involved in the functioning of the judiciary, the independence of prosecutors must also be assessed.

2.8.1.1 Qualification and appointment of judges and prosecutors

Judges at all levels are appointed by the President acting on the proposals of the Minister of Justice and in accordance with the advice of the *Conseil Supérieur de la Magistrature*.[1010]

A person could qualify for appointment as a judge of the *tribunal de canton* if he could prove that he has completed secondary education and special training determined by the Justice Minister. To qualify for appointment as judge-president of that tribunal, a person must hold a law degree or have five years' experience in the functions of judge in a *tribunal de canton.*[1011]

As regards the *tribunal de première instance,* to qualify for appointment as judge, a person needed to have a law degree and three years' experience in judicial functions or legal functions in public service or a law firm or law educational institution or, failing a law degree, six years' experience in the functions of assistant judge or assistant public prosecutor. This provision also applies to the qualification for appointment as assistant public prosecutor.[1012] To qualify for appointment as judge-president of the *tribunal de première instance* or public prosecutor in that tribunal, the candidate must have, in addition to a law degree, at least seven years' experience in judicial functions or legal functions in a public service or law firm or law educational institution or, failing a law degree, at least

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[1008]Kint, R., L'indépendance de la magistrature en droit rwandais *in Revue Juridique du Rwanda, 1983/1, p. 1-8.*

[1009]See Council of Europe, Human Rights in international law, Council of Europe Press, 1992, p. 31-56; 342-362.

[1010]See the law on the statute of judicial staff, *in Décret-Loi No. 06/82 of January 7, 1982, art. 20, J.O., 1982, p. 285; Loi Organique No. 07/92 of 19 Nov. 1992, art. 11, J.O., 1992, p. 1959.*

[1011]Id., art 6 & 7.

[1012]Id., art. 9.

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ten years' experience in the functions of deputy judge-president of a *tribunal de première instance* or first assistant public prosecutor in that tribunal.[1013] These are also the requirements for appointment as judge or deputy public prosecutor in the *Cour d'Appel.*

At the level of the *Cour de Cassation*, a person could qualify for appointment as judge or assistant public prosecutor if, in addition to the law degree, he had at least fourteen years' experience in judicial functions or legal functions in a public service or law firm or law educational institution. These are also the qualifications required for appointment as judge-president of a *Cour d'Appel* or *Procureur Général* in that court.[1014]

In case the candidate is a Doctor of Laws, the period required for professional experience is reduced to two thirds.[1015]

These are the only professional qualifications that any person needs in order to be admitted to the Rwandan courts of law. Other prerequisites for appointment as judge such as, for instance, admission to the bar, as is the case in other countries[1016]are not required. Perhaps this has been due to the fact that there was no bar in Rwanda until 1998.[1017]

However, it should be pointed out that no single Rwandan had a law degree at whatever level at independence.[1018] The University of Rwanda was only established in 1963 and its Law Faculty was inaugurated in 1974. After Tutsi judges - themselves without any qualification in law - were ousted between 1959 and 1961 and upon the hurried departure of Belgian judges on independence, a number of Hutus were appointed judges and prosecutors without academic qualification and judicial experience. It was only in 1963 that the first Rwandan law graduate from Belgium, *Fulgence Seminega*, was appointed judge-president of the Supreme Court. Three years later, *Donat Murego*, was appointed deputy judge-president of the same court, from 1965 to 1970, while *Juvénal Muganga* was judge in that court from 1970 to 1973. *Apolinnaire Nsengiyumva* was the second deputy judge-president, from 1965 to 1972, and *Antoine Ntashamaje* was the third deputy judge-president, from

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[1013]Id., art. 11.

[1014]Id., art. 13.

[1015]Id., art. 15.

[1016] Examples: Benin, Zambia, and France.

[1017] For details, see Kint, L'independence de la magistrature en droit rwandais, at 1-8.

[1018] Id.

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1965 to 1976.[1019] These were the only university law graduates the country had until 1978, when the first 23 students of the Faculty of Law received their law degrees at the National University of Rwanda.[1020] The four-year training was organised in such a way that there was graduation every two years until 1985 when annual graduations started. However, not all trainees who graduated were appointed in the judicial service, since a number of them preferred a better salaried position in the private sector. We will also see how the recruitment of judges and prosecutors has been exercised with ethnic and regional bias.

Before the genocide, only 34 out of 659 judges had studied law at an advanced level, and none of the cantonal court judges had any legal training. In addition, out of 84 government prosecutors, only 18 held degrees in law. These inadequacies had a considerable influence on the quality of justice. They also provided a loophole for accused persons, whose lawyers (when they had any) could easily invoke faults in procedure as grounds for having their clients released. Such failings make judges more susceptible to corruption and to interference by the executive in the administration of justice. It may be noted that Article 86 of the Constitution states that "the President of the Republic is the guarantor of the independence of the judiciary".[1021] However, some of the difficulties the Rwandan judicial system has had in functioning, have been the results of inadequate human resources.[1022] Therefore, the conditions for qualification as judge or prosecutor have never been met and *Marchall*'s contention that "the greatest scourge an angry heaven ever inflicted upon an ungrateful and a sinning people was an ignorant, corrupt, or a dependent judiciary"[1023] found its application here. In this regard, *Havugimana* observes, without concrete examples, that many judges and prosecutors have had to keep "good relations with their appointing authorities" in order to remain in their positions and, on the other hand, "people coveting judicial positions" did "everything possible to get them without required qualifications.[1024]

Since all the members of the *Conseil Supérieur de la Magistrature* were appointed by the President, it is apparent that the latter had enormous power *vis-à-vis* the appointment of judges under the *décret-loi* regulating the judicial staff. Apart from the 'proposals' from the Minister of Justice - who

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[1019]For details, see Reyntjens, Pouvoir et droit au Rwanda, at 437.

[1020] See, Université Nationale du Rwanda, *Annuairre*, 1979.

[1021] Author's translation.

[1022] Material resources as well as interference by political and administrative authorities have also played a great role. UN, United Nations and Rwanda, 1993-1996, Document 20, at 209.

[1023]Borkin J., The Corrupt Judge, p. 9.

[1024] Havugimana, D., Droit judiciaire, Butare: UNR, 1984, p. 23.

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was also appointed by discretion of the President - and the advice of the *Conseil Supérieur de la Magistrature*, it was unfortunate that the President's power to appoint judges to courts including the highest court, was not subject to any check or control by the legislature or any other independent body. Notwithstanding that he acted in accordance with the advice of *Conseil Supérieur de la Magistrature*, his power was considerable. This was because, despite the constitutional provision on the independence of the judiciary, the *Conseil Supérieur de la Magistrature* was not, in practice, a truly independent body. It was dominated by the President's political appointees, who inevitably had to "dance to the master's tune".[1025] It is arguable that the overwhelming dominance of the President in the appointment of judges diminished the independence of the judiciary to a large extent. It was likely that under such circumstance political consideration played a greater role in the selection of judges than merit and integrity.

2.8.1.2 Security of tenure, discipline, and removal of judges

A judge or a prosecutor has to vacate his office on attaining the age of seventy years.[1026] Apart from this, a judge can be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour.[1027] A judge can only be dismissed in accordance with an elaborate procedure stipulated in the *Décret-Loi,* which provides for a disciplinary committee. The committee consists of the judge-president of the *Cour de Cassation*, chairman, the deputy judge-president of the same court, vice-chairman, and judges who are members of the *Conseil Supérieur de la Magistrature.*[1028] The procedure requires that the Minister of Justice denounces the facts that justify the disciplinary proceedings to the committee and the chairman appoints a *rapporteur* from among the members of the committee. The charged judge is invited by the Minister of Justice to appear before the committee, which can deliberate only if two thirds of the members are present. The same procedure applies for the prosecutors whose disciplinary committee consists of the General Prosecutor in the *Cour de Cassation,* chairman, the first assistant public prosecutor in the same court, a civil servant from the Ministry of Justice appointed by the Minister, and the prosecutors who are members of the *Conseil*

[1025]Sahinkuye, M., L'organisation et la compétence judiciaires au Rwanda face au droit international des droits de l'homme, Butare: GSO, 1991, P. 83.

[1026]See the law on the statute of judicial staff, CLR, Vol. II, 1995.

[1027]Id., art. 75, 119, 122, 124.

[1028]Id., art. 64.

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Supérieur de la Magistrature.[1029]

The provisions contained in the *Décret-Loi* under study regarding security of tenure, discipline, and removal of judges, if observed, were sufficient to ensure that the Rwandan judiciary was independent and met international standards.

As all the institutions in Rwanda were politicised[1030], judges were suspended or removed from office in violation of the provisions contained in the *décret-loi*. Available documentation shows that *Eugène Ndagijimana* was suspended for failing to participate in the *umuganda* in June 1986.[1031] In November 1996, *Sylvère Bugilimfura*, judge in the Kigali court of appeal, was suspended for opposing illegal occupation of Hutu properties by army officers and abducted.[1032]

2.8.1.3 No duty to advise the executive

One of the hallmarks of judicial independence is that judges do not have a duty to advise the executive in cases that do not come before them in the ordinary course of justice, or to warn the government concerning the legality of proposed action.[1033]

Since independence, the successive regimes reaffirmed their commitment to maintaining an independent and impartial judiciary on many occasions.[1034] Examples abound, however, which show that the government overtly interfered with the functions of the judiciary.

In November 1974, two Burundian soldiers based in *Ngozi* crossed into Rwanda at *Akanyaru*, without their weapons, to find out why a Rwandan immigration officer was calling them. They were arrested, detained and tried for illegal entry into Rwanda. In the *Butare tribunal de première instance*, where they were convicted of the offence, each was fined five thousand francs or, upon default, three months imprisonment. Upon review of the case by the *Nyabisindu* Court of Appeal, the court quashed the sentence and released the 2 soldiers on December 12, 1974 on the ground that the two fines were "too severe and unlawful". Default in paying the fine would have led to 15 days' imprisonment and not three months. The court stated that there was nothing sinister on the part of

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[1029]Id., art. 64-66; 75 & 76.

[1030]For details of the politicisation of Rwandan institutions, see Lizinde, T., La découverte de Kalinga ou la fin d'un mythe, Contribution à l'histoire du Rwanda, Kigali: Someca, 1979, p. 191-191.

[1031]Letter dated 14 June 1986 from the Minister of Justice.

[1032]Matata, J., Epuration ethnique de la magistrature rwandaise, April 1997, p. 4.

[1033]See *Mutsinzi v Ministère Public*, RPA 981/Kig, Nov. 1997

[1034]See *Discours du President de la République*, 1978, p. 198; Statement by President Bizimungu, July 6, 1995.

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the prisoners; they divested themselves of their weapons before entering Rwanda and they openly crossed the border in daylight, after an exchange of non-abusive words with a Rwandan immigration officer who called them across. The court went on to say that their immediate arrest, subsequent detention and charging did not redound to the credit of the Rwandan authorities.[1035]

As the *préfet* of *Butare* was dissatisfied, he called a meeting in which he described the court's decision as a "*décision politique*". He argued that, since Rwanda was in a state of emergency, the *Cour d'Appel* should not have quashed the sentence in this manner. He held that the court should review its decision according to the circumstances prevailing in the country.[1036] However, the State prosecutor defended the *Cour d'Appel*. In a letter to the President he did not accept that the judgement was political in any sense or motivated in any way by political considerations. He said it was wrong to describe it in such terms since he had consulted with other judges and that they were unanimously of the opinion that the court had acted properly and that its decision had done justice. He deplored and condemned the acts of aggression committed against Rwanda by some neighbouring regimes in the same way that he had always condemned the tyranny committed by the organs of the government in those States. He stressed, however, that this should not mean that judges should decide cases or impose sentences in such a way as to please public opinion or the government, but that they should rather decide them in accordance with facts before them and the law which was relevant. He concluded that it was only in this manner that an accused person could be guaranteed a fair and impartial trial before an unbiased judge free from the domination of public opinion.[1037]

Following this and other events that did not please the government, individual judges were threatened and considerable damage was done to the integrity and independence of the judiciary by these events. First, it led to the assassination and resignation of some judges, like *Karemano* who was arrested and killed in *Ruhengeri* prison in January 1975, and *Murekezi* who resigned and went

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[1035]RPA 848/Nya, 12/12/1974.

[1036]Rapport de la réunion des chefs de services de Butare, December 15, 1974.

[1037]The letter reads: "Je ne conviens pas que l'Arrêt que la Cour d'Appel... était en quelque sens que ce soit une décision politique ou motivée en quelque manière que ce soit de considérations politiques, et, il est faut de le décrire en ces termes. J'ai consulté les autres juges et nous sommes d'avis unanime que la Cour a agit comme il le faut et sa décision a fait justice. (...) Les actes d'aggression perpétrés contre le Rwanda par quelques régimes voisins sont à déplorer et condamner vivement de la même manière que la tyrannie commise par les organes gouvernementaux de ces Etats. Cependant, ceci ne signifie pas que les juges devraient statuer sur les affaires ou imposer des condamnations de manière à plaire à l'opinion publique ou le gouvernment. Ils doivent juger compte tenu des faits leur présentés et la loi dont ces faits relèvent. C'est seulement en procédant de la sorte que l'inculpé peut avoir la garantie d'un procès juste et impartial devant un juge impartial, libre de toute domination de l'opinion publique. *Letter No.15/ka dated 15 December 1974.*

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into exile in Burundi the following month.[1038] Second, and more importantly, the crisis cowed the judiciary into submission. The judges who remained on the bench understood that it was dangerous to pass judgement against the government, and in favour of individual rights, especially in politically sensitive cases. Paper guarantees of independence would not save them from rampaging mobs set loose by the government. From that time onwards, and as the government increasingly undermined democratic institutions during the one-party era, it was hardly necessary for the government to overtly interfere with the judiciary. The message had already been received loud and clear.

2.8.2 Assessment of the Rwandan judiciary's role in the protection of human rights

> It is almost a truism that the quality of justice depends more upon the quality of men who administer the law than on the content of the law they administer.[1039]

Although the law (both statutory and case law) lays down a few elaborate provisions to ensure judicial independence,[1040] much still remains to the individual judges themselves. *Schwartz* once wrote that,

> Unless those appointed to the bench are competent and upright and free to judge without fear and favour, a judicial system, however sound its structure may be on paper, is bound to function poorly in practice. That is why the problem of judicial selection and tenure is the pivotal one in all discussions of the proper administration of justice.[1041]

The Rwandan judiciary, like most other judiciaries in Africa[1042], has not been a sentinel of liberty. The courts have supinely upheld government actions and laws against constitutional challenge. When civil liberty cases presented any real choice, courts have almost invariably sustained the impugned government action. The cases of *Ntagarukanwa*[1043] and *Kamangu*[1044] are prime examples of this. To be sure, except for cases pertaining to the 1994 genocide as analysed in Chapter three, few cases alleging violation of human rights were ever presented to the courts, despite the large-scale violation

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[1038]Mukendi, K., The judiciary in central African countries, Working paper, Nairobi: CSP, 1980, p. 49.

[1039]Hynes, The Selection and Tenure of Judges, 1944, 5.

[1040] See Cass. 122, 12/8/87.

[1041]Schwartz, B., American Constitutional Law, 1955, p. 130.

[1042]E.g. Professor Dew Days and others have written of the Kenyan judiciary: "the Kenyan courts have often evaded their constitutionally mandated responsibility to protect individual rights. The courts have stood aside as the Kenyan government has used the Preservation of Public Security Act (the Kenyan detention law) as instrument of political repression". The courts have largely refused to review allegations of torture or other mistreatment. In the face of judicial inaction, blatantly political prosecutions for treason and sedition have proceeded without serious examination of the constitutional values at risk." Drew Days *et al.*, Justice Enjoyed: The state of the judiciary in Kenya, 1992, p. 9.

[1043]RP 1792/But, 1979.

[1044]R.C. 923/86, 29/9/1986.

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of human rights which has taken place. The category of cases that the courts dealt with, although few, involved rights of people detained without trial. Most of the detention cases have been decided in favour of the government as the courts have declined to inquire into the merits of detention orders.[1045] Moreover, the courts even allowed the government to detain people for economic crimes that had absolutely nothing to do with public security.[1046] Furthermore, the courts upheld detention without trial of people acquitted of purely criminal offences.[1047]

The few cases that were decided in favour of detainees were those in which there was clear non-compliance by the government, with the procedural safeguards laid down by the Constitution and/or the law[1048] or where torture was conclusively established.[1049] In many such cases the government simply issued fresh detention orders curing the original error.

Since independence, there have been only four instances in which the court has declared a provision in a statute void for being in conflict with the Constitution.[1050]

Why have the courts been so ineffective in protecting human rights? Several explanations may be suggested, some of which apply to the judicial function in African countries generally, and others which apply to the Rwandan judiciary in particular.

First, the expansive nature of clawback clauses to guaranteed rights have placed severe limits on the courts' power to uphold human rights. These clauses in most cases are so broad as to negate the substance of the rights guaranteed. In *Kamangu*, for example, despite finding that the petitioner had been hindered in the exercise of his freedom of conscience, the court nevertheless upheld the government's action under one of the permitted derogations. Again, in *Ntagarukanwa*, the government's action in depriving the applicant of his property was upheld by the court under one of the permitted derogations.

[1045]In Re Rukeza, the court declined to inquire into the merit of Rukeza's detention for the simple reason that the State always had the right and the obligation to detain suspects to make sure they would not escape justice. RP 712/89.Kad; See also Re Kayumba & Munyandamutsa and Re. Sebakunzi, RP 1019/But. 1992.

[1046]See for example *MP v Mbonabucya*, RP 1215/87.

[1047] This happened, for example, when two suspects of robbery were rearrested after their acquittal. The court held that the re-arrest was justified by public interests and did not go any further. *Recueil des Procès, No. 391, 5 December 1996, p. 40.*

[1048]RP 2122/But.

[1049]RMP 1140/Kib.

[1050]Those cases are: A. No. 19/11.02 of 22.5.1963 (law on Rwandan citizenship); No. 42/11.02 of 5.5.1964 (law on the Head Tax); No. 73/11.02 of 7.8.1965 (law on elections in Rwanda) and No. 78/10.02 of 26.4.1966 (law on national education). *See Reyntjens, Pouvoir et droit au Rwanda, at 431.*

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Second, courts in Rwanda do not have an independent supervisory authority. They depend on litigants bringing actions before them. It follows, therefore, that the courts are impotent to protect human rights, no matter how egregious the violation, until a litigant brings an action. The rationale underlying this rule is that it is imperative for the proper administration of justice that there should be harmony between the Executive and the Judiciary and that the principle of the judiciary, the only body ruling on actual disputes, be upheld. A meddlesome judiciary, says *Nuabueze*,

> ... poses the danger of abuse, and of conflict with the government, and is well calculated to undermine, if not destroy, the courts popular image of an impartial, disinterested arbiter between contestants in a dispute. It is this posture of impartiality and disinterestedness that makes a decision invalidating a government act, tolerable to the government. Realising that the court is not the prime-mover or instigator of its discomfiture, that its only role is to interpose the machinery between the government and its opponents, the government should have no reason to feel antagonised by an adverse decision.[1051]

As noted earlier, very few private individuals have sued the government for violating their rights and therefore the courts have had little opportunity to adjudicate constitutional civil liberty cases. Besides, there has been no organisation, public or private, to typically raise constitutional issues. The prohibitive cost of litigation has contributed to the paucity of litigation.[1052] Only wealthy people or people backed by their political organisation could afford litigation. In the closing days of the *Habyarimana* regime in 1992, all the constitutional cases were brought by the MDR.

Another reason for the paucity of litigation is that, owing to the high level of illiteracy, most people were/are ignorant of their rights. This is exacerbated by the fact that the judicial process is too technical for most people to comprehend and it consequently is not easy for them to move the courts for redress. Besides, the *Tribunal de Première Instance* is inaccessible to many people as it is located in towns, while the majority of people live in rural areas. The low level of political consciousness has also inhibited constitutional litigation. Unlike in Western countries where the public is alert and self-assertive in defending its rights, the masses in Rwanda have tended to be extremely fearful of government officials and have suffered for long periods because of the inaction of inefficient or corrupt officials, without endeavouring to do anything about their rights. Low political consciousness has been caused by a number of factors, including the absence of a free press, the high level of illiteracy, and the absence of democracy.

[1051] Nuabueze, Judicialism in Commonwealth Africa, 1977, p. 49-50.

[1052] In the United States of America, for example, it is mostly wealthy private litigants or clients of some private associations of moral entrepreneurs, the NAACP or the American Civil Liberties Union, who typically raise constitutional issues. Seidman, 1978, p. 364.

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The same reason can also serve to explain the rarity of administrative jurisprudence, which, in part, is due to the people's reluctance to appeal to the *Conseil d'Etat* to nullify administrative decisions made in violation of their rights. This is because Rwandan people do not dare to oppose the State. They prefer to be subjected to irregularities rather than to behave like an "enemy of the State".[1053] In fact, although they might legally be right, people prefer "not being noticed" by bringing an action against the State, particularly when it is a matter of issues likely to be perceived as "political". Needless to say, any matter involving the State has political connotation in one way or the other for a Rwandan. In the eyes of most Rwandans, the automatic dismissal of a civil servant, or a refusal to issue a passport without apparent proper reason, would be political.[1054]

The successive regimes did not stimulate people to exercise their right to submit cases to courts, but inhibited them instead. This can be attested, *inter alia*, by the report of the parliamentary commission of 1968, which indicated that the ministerial circular No. 253/Just issued on March 22, 1967 required that any complaint against a public authority be submitted, first to the communal council, and then to the Ministry of the Interior.[1055] Needless to say, this circular had no constitutional or any other legal basis.

Third, judges are constrained by the fact that they can take cognisance only of concrete cases involving rights of parties before them. They are not vested with a general kind of power to entertain any matter implicating a constitutional issue at the instance of anyone. Their role is not that of "standing as an ever open forum for the ventilation of all grievances that draw upon the Constitution for support".[1056] Therefore, for the court to intervene, a definite "case" or controversy at law or in equity between *bona fide* adversaries under the Constitution and the law must exist, involving the protection or enforcement of valuable legal rights, or the punishment, prevention, or redress of wrongs directly concerning the parties to the justiciable suit.[1057]

Fourth, and closely linked with the preceding limitation, is the requirement that a party must have *locus standi* or standing before he can invoke the court's jurisdiction. "Standing" imports that the affected individual is in imminent danger of coming into conflict with the statute, or that his rights or normal business or other activities have been directly tempered with, by or under it. This was

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[1053] Havugimana, Droit Judiciaire, at 25.

[1054] Reyntjens, Pouvoir et droit au Rwanda, at 436.

[1055] Ibid.

[1056] Wechsler, Towards neutral principles of constitutional law 73 Harv. L. Rev., 1 (1959).

[1057] Abraham, H.J., The judicial process, 1968, p. 355-356.

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expressed in the case of *OCIR-CAFE v Ngomanzungu*[1058],

> The party who invokes the power of the court must be able to show not only that the statute is invalid, but that he had sustained, or is immediately in danger of sustaining, some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

This position, needless to say, is deplorable as it reduces the efficacy of a bill of rights. It is not only the legitimate function of the courts to enforce the bill of rights, but the efficacy of the constitutional guarantee of human rights is a paramount requirement of the rule of law, calling therefore not for restraint but for "vigorous, vigilant, courageous activism on the part of the court".[1059]

While it is appreciated that the requirement of *locus standi* is meant to deter the "professional litigant" and the "meddlesome interloper" from invoking the court's jurisdiction in matters that do not concern him, there is nevertheless something paradoxical in the idea of a judge declining, on account of want of *locus standi*, to hear a challenge to a law he himself knows to be unconstitutional because it violates a right guaranteed by the Constitution. This is tantamount to approving of the law, and thereby condoning oppression.[1060]

Fifth, the presumption of constitutionality, which holds that a statute is presumed constitutional until the contrary is proved by a party alleging that it is unconstitutional, is a serious limitation on judicial power. This tends to impose an onerous burden on the complainant even if he has established a *prima facie* case of interference with his rights[1061] and the purpose of entrenched fundamental rights which is to forestall easy interference or infringement seems to be defeated.[1062] The rationale for the presumption of constitutionality is that, since the legislature represents the people, it would not *prima facie* wish to exercise its power illegitimately. But given the way the Rwandan legislature has been put in place over years, it would be misleading to assert that it really represents "the people". This presumption, when applied to laws alleged to contravene the constitutionally guaranteed rights, is particularly indefensible. In fact, "it is primarily to prevent the minorities being oppressed by the majority that the rights are entrenched in the Constitution, but the operation of this presumption is bound to impair efficacy. It is submitted, therefore, that the presumption of constitutionality in relation

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[1058]Cass. 46/86, 10/5\1986. In *Nyilibakwe v Karekezi*, the court dismissed the application on the ground that it did not directly concern the applicant but someone else. RCA 1066/92.But.

[1059]Black, CL, The people and the court, 1960, p. 100.

[1060]Nuabueze, Judicialism, at 360.

[1061] Read *Nkinzingabo v Etat Rwandais*, Kig. RP 045/81 (1981).

[1062] Kamangu case, R.C. 923/86, 29/9/1986.

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to human rights is completely repugnant to the primary purpose of the entrenchment".[1063]

As already seen, successive governments have used their legislative majority to pass legislation which attenuated individual rights, and also introduced either a one-party State or something similar. Thus, to apply the presumption of constitutionality to such legislation seems indefensible.

Sixth, although judges and prosecutors are not allowed to affiliate themselves with political organisations, the successive regimes have been influencing them to bias one side against the other. Despite the requirement of tenure until the age of 70 years, each regime appointed its own judges and prosecutors since those previously in the function were most often regarded as collaborators of the ousted regime and, therefore, unworthy of confidence. As indicated, when Hutus took power at independence, Tutsi judges were kicked out. During the *Habyarimana* regime, a number of judges and prosecutors who had been appointed during the *Kayibanda* era were either killed or forced to resign.[1064] Those Hutu judges and prosecutors who are not killed will be either arbitrarily arrested or forced into exile to be replaced by Tutsis.[1065] Therefore, the most experienced judges met with the same fate as the regimes which had appointed them and justice was always in the hands of novices.

Seventh, Judges in Rwanda, like their counterparts in some other African countries, have inherited the civil law attitude towards the judicial function.[1066] This is an attitude that attaches little importance to importing literalness and analytical positivism into the interpretation of the law, enforces a narrowness of outlook towards problems presented for decision and discourages creative activism. Judges are guided by the principle of the *"hiérarchie des normes"* which sets out a variety of competing authorities to which a lawyer may look for material on which to base an opinion, whether as counsel or as judge.[1067] Argument in court by lawyers concentrates almost entirely on analysis of the law as embodied in statutes and decided cases and very little reference is given to policy

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[1063]Nuabueze, B.O, Constitutional law of the Republic of Nigeria, 1964, p. 311.

[1064] Havugimana, Droit Judiciaire, at 32.

[1065] See Chapter three.

[1066]Kint, R., Introduction au droit écrit, Butare: UNR, 1983, p. 20.

[1067]The sources of Rwandan law are the following: the Constitution; international conventions; codes and statutes, and provisions of legislative acts of subordinate authorities, such as presidential decrees, and ordinances of administrative authorities; the *travaux préparatoires*, that is to say, the records of the public discussions, written and oral, which have preceded and accompanied the promulgation of the legislative text (Rwandan jurisprudence, unlike in the common law system, has no principle condemning the relevance of such material as an aid to interpretation); reported decisions of the courts (national as well as foreign) and learned annotations, usually by academic writers; local customs; and equity (*ex aequo et bono). Basomingera, Introduction au Droit Constitutionel, at 51; Kint, Introduction au droit écrit, Id.*

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considerations.[1068] Even in common law countries, according to *McWhinney*, the pervasive influence of a common law education and a common law system of professional organisation have conditioned the minds of judges and legal practitioners culminating in a:

> ... uniformly positivist attitude to constitutional adjudication; the "strict statutory construction" approach to the constitutional instrument, the insistence upon full and complete divorcement between law and politics, sociology, and economics, and consequent refusal to consider materials drawn from these other social sciences, which might give the dry provisions of the constitutional text an ample meaning; the adherence to *stare decisis* and the doctrine of precedent in its most mechanical form.[1069]

This attitude is, in part, due to the method adopted for selecting judges, which is in contrast to the method employed, for example, in the United States of America where, *McWhinney* says,

> ... strict professional expertise plays a comparatively minor part in the selection of personnel for appointment to the Supreme Court, and broad intellectual qualities, as manifested in distinguished service in public life or in the executive branch of government (e.g. as Attorney General or Solicitor General), or as manifested in academic achievement in the Universities and law schools, receive prime attention. And it seems clear that this wide basis of selection of judges has done much to mould the broadly pragmatic, policy-making approach that characterises constitutional decision-making in the United States of America today, even though the forms and practices of private law adjudication are still contentionally adhered to by the court.[1070]

In Rwanda, although the Constitution provides for the independence of the judiciary, the latter has not been independent, mainly since judges are appointed by the government, either on the basis of their ethnic group or geographic origin or on the basis of their professional expertise (a number, although small, have been former magistrates or state prosecutors or attorneys in private practice), rather than on account of their broad intellectual qualities. As a result, they have demonstrated an intellectual inability to appreciate some of the issues presented for decision. Their judgements, thus, often lack insight and intellectual stimulation, as shown in the cases analysed in this dissertation. The lack of independence can also be perceived, to some extent, in the climate of suspicion in which the parliament did not want to uphold the rulings of the Constitutional Court on unconstitutional bills simply because the unconstitutionality was ruled by Tutsi judges.

Lastly and in connection with the preceding developments, it is axiomatic that judges do not just decide cases mechanically. They are influenced to some extent by their private interest, notwithstanding the fact that judicial independence purports to insulate them from such incentives.

[1068]Kint, L'independence de la magistrature en droit rwandais, at 1-8.

[1069]McWhinney, Judicial Review in the English-speaking World, 1965, p. 27-28.

[1070]Id.

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Cantonal judges, for example, hope to be promoted to the *Tribunal de Première Instance*; and *Tribunal de Première Instance* judges hope to be promoted to the *Cour d'Appel*. Judges in the *Cour d'Appel*, as well as those in the *Cour de Cassation,* have their own reference groups, whose reactions affect their decisions. The observation made by *Robert Martin* regarding the socialist State, is also valid for Rwanda:

> ... we must also ask whether the whole concept of the independent judiciary is illusory. Judges are members of the ruling class by birth or assimilation (regardless of what that class may be) and hired employees of the State who depend ultimately on the coercive power of the executive for the enforcement of their decisions. To disregard these conditions in an attempt to be totally independent would be meaningless.[1071]

The fact that the regime of the day in Rwanda appoints its own judges, despite tenure, suggests that judges are an integral part of the political elite. They, thus, have an interest in maintaining the *status quo*. Paper guarantees of judicial independence have failed to transform most of them into vigorous protectors of human rights and fundamental freedoms. Thus, judges have adhered to the literal language in clear cases, but in cases with room for discretionary choices their values have led them to uphold impugned government actions in civil liberties cases.

As is quite evident, the judiciary is in a position too weak to effectively protect individual rights without the support of the other branches of government. This tends to confirm the views of some writers who contend that what is necessary is good government and not a bill of rights. Good government, as the argument goes, can dispense with a bill of rights, and good government is evidenced in respect for the judiciary.[1072] This argument, however, fails to state how good government is attained. A bill of rights is one of the ways of fostering good government.

2.8.3 The legal profession

An independent legal profession is an indispensable counterpart to an independent judiciary. Needless to say, without an independent and courageous legal profession to conduct cases before the courts an independent judiciary would be almost totally ineffectual in enforcing human rights as it, at least in Rwanda, by its very nature, has an extremely limited right to free action. Therefore lawyers, like judges, should be allowed to discharge their professional duties without restriction, influence, inducement, pressure, threat or interference, direct or indirect, from any quarter or for any

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[1071]Martin, R., Personal freedom and the law: A study of Socialist State administration, 1974, p. 55.

[1072] Sanders, AJGM, "The Bill of rights Issue: Look at the Rest of Africa!" 1990 South African Public Law, at 185.

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reason.[1073]

Article 81, (1) and (2) of the *Code de Procédure Civile et Commerciale*[1074] provided for the monopoly of the legal practice by lawyers registered at the national bar and, upon authorisation of the Minister of Justice, by foreign lawyers. As an exception, however, the same provision allowed parties to be represented or assisted by an authorised representative or any proxy whose quality was established at the audience by the represented party or by a special power of attorney given by mention at the bottom of the summons.

In penal matters, Article 73 of the *Code de Procédure Pénale* obliged the suspect to appear personally, save in case the offence was punishable with imprisonment not exceeding two years. In this case he could be represented, as was the case for civil matters.

Before the 1994 genocide there were about 40 lawyers in the country, with most of them working in private practice in the few large towns. There were, and still are, virtually no lawyers in rural areas and small towns, where the majority of the population lives. It is apparent that 40 lawyers is a very small number given the size of a population of over seven million people and the geographical distribution of lawyers. Moreover, there was no bar association until 1997, therefore the exception in Article 81 was rather a general rule. Furthermore, articles 81 and 73 did not provide for a legally regulated profession and, since there was no *sine qua non* for a proxy *ad litem*, anyone could claim to be an "attorney at law". That is, anyone from any educational background could claim to be an *avocat*. As a result, a high proportion of accused persons were not assisted during their trials, or received only very poor assistance. The majority of "attorneys", as far as professional ethics are concerned, were of a deplorable standard and the quality of their services was most often mediocre. Commenting on the absence of a bar in Rwanda, *Havugimana* observed "a proliferation of a flood of business agents some of whom were of service for a number of persons unable to defend their infringed rights" but others were "laymen and ignorant in the field of law and sullied the praises and merits of the law practice".[1075]

[1073]Montreal Universal Declaration on the Independence of Justice, 1983, Chap. 3, par. 3.02, 3.03 and 3.04. The declaration, which was made by the World Conference on the Independence of Justice held in Montreal, Canada, from June 5 to 10, 1983, is published as annex 11 in The Independence of the Judiciary and the Legal Profession, 1988, p. 161-184.

[1074]Law of 15 July 1964, J.O., 1964, p. 275 as modified (J.O., 1986, p. 158); Codes et Lois du Rwanda, Vol. II, 2nd edition, 1995, p. 530.

[1075]He said: "Faute de barreau, la représentation en justice, entendue à base de mandat seule en vigueur, a donné naissance à une vague sinon à un "flux" d'agents d'affaires qui ont rendu certes service à beaucoup de gens qui n'étaient pas à même d'assurer en justice d'une façon adéquate la défense de leurs droits lésés. Cette volonté, en elle-

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Whereas the *décret-loi* No. 09/90 subjected the appointment of judges and government prosecutors to training criteria, nothing similar was required by the law of 12 May 1984 with regard to persons involved in the practice of law. The author contends that being real representatives of the law, such persons ought to have a level of legal knowledge to enable them to work and militate in favour of sound administration of justice. The omission of the training requirement resulted in the non-success of the law of 1984, mainly because having to turn to law practitioners who did not have essential legal training was one of the causes of a typical climate of mutual suspicion between, on one side, the judge and the lawyer, and, one the other side, the lawyer and the justiciable. It is not unusual to come across lawyers and judges who clearly despised one another during the court's proceedings, especially when one had a law degree while the other did not.[1076] On the other hand, Rwandans are frequently heard to say, "That person cannot manage to defend my case; I know him, he does not have a law degree". Sometimes, would be added: "even at school, he used to fail". In such an atmosphere of mutual contempt and suspicion, it is hardly possible for the law to develop.

Not attorneys at law only, but most judges also, had not undergone legal training. It was indicated earlier that, at independence, no single Rwandan had a law degree. This was because of the absence of national facilities for the training of lawyers during the colonial period, because Belgium did not consider it politically wise to train African lawyers, fearing they would turn into agitators on their return to Ruanda-Urundi.[1077] Moreover, lawyers were assigned a relatively minor role, as the organisation of the legal system was such that, except in respect of more serious criminal offences, members of the judiciary, as well as lawyers, were kept away from regular official contact with the African population. Most of the cases involving Africans were adjudicated by customary courts where lawyers were not allowed. The reader should recall that, from independence until 1976, Rwanda had only five people who had university degrees in law.

Legal education began in earnest with the establishment of the Faculty of Law at the University of Rwanda in 1974, ten years after the founding of the University. The "licence"[1078] of the law degree

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même, était louable, mais encore faut-il déplorer que certains esprits, pourtant profanes et ignares en la matière ont souillé les louanges et les mérites de cette pratique combien noble et délicate! D'autres se sont attribués des titres d'avocat ou de maître sachant ou ignorant peut-être ce à quoi ils (ces titres) répondent. *Havugimana, D., "Les incidents de la procédure en droit judiciaire privé"*, thesis, *Butare: UNR, 1983, p. 60-61; see also Mwumvaneza, M."Umwuga mushya wo kuburanira abantu", in: IMVAHO, No. 449, 4-10 October 1992, p. 4.*

[1076] In one case, Felicien Gatabazi was charged with contempt of court for having told a presiding judge that he did not know the legal doctrine regarding the case in question. He challenged this charge in the court of appeal and won the case. See *Gatabazi v Karambizi*, RCA 122/83 (1983).

[1077] See Chapter three.

[1078] Can be taken as equivalent to LLB

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programme offered by the Faculty is based on the Belgian paradigm, that of a four-year programme.[1079]

Students spend two years studying fundamental courses in the Humanities and Social Sciences, as well as basic law courses, after which they spend another two years studying purely law courses that lead to obtaining the law degree. Students have to pass 54 courses to get a degree in law. All the courses are mandatory, except for one optional course that students can select to study at any of the University's faculties.[1080] However, not a single course focussing on human rights is offered.[1081] Unlike in some other universities, students are not offered an opportunity to participate in a moot court programme based on appellate brief arguments. As a remedy, students have some very limited sessions of legal aid exercises in the first year of the second level. In the final year, they spend two months training in courts or in private law firms. As a former student at that Faculty, the author has observed that the teaching method lays too much emphasis on formalism: students are taught to memorise large numbers of rules organised into categorical systems (e.g. requisites for contracts, rules about breach). They learn issue spotting to identify the laws in which the rules are ambiguous, in conflict, or have a gap when applied to particular fact situations. The students do not usually learn case analysis, as textbooks rather than casebooks or law reports are the basic tools for instruction. The students learn broad holdings of cases. They do not learn policy arguments. Most of the rules learned are straight from Belgian or French textbooks. It is easier to learn Belgian or French rules than local rules in the African context, because the difficulties of working with local materials are often formidable. The result is that students are not taught to think creatively about legal problems. This inevitably has an impact on how Rwandan lawyers and judges handle cases involving human rights. As noted earlier, many of the human rights cases decided in Rwanda lay too much emphasis on formalism and reveal few policy arguments. Moreover, there is no further legal training for law graduates in Rwanda. The author is persuaded that the country needs legal training that, as far as possible, uses local materials with emphasis on developing the ability to think clearly and critically, rather than the memorisation of rules of law. In the United States of America, a graduate, upon entry into the profession, will usually be under the guidance of a more experienced attorney and will gradually be given increased responsibility according to his readiness for it. The position in Rwanda is altogether unlike this; there is no opportunity for further education or refinement of legal skills after the completion of formal training for the recent graduate. Owing to the scarcity of lawyers, the new

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[1079]UNR, Annuaire, 1979.

[1080]Ibid.

[1081]The Bill of rights, though, is briefly covered under Constitutional law.

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graduate is immediately expected to assume major responsibilities.[1082] It is needless to say that creative thinking is imperative for Rwandan lawyers, as it is for other Rwandans, in order to solve the problems related to the social, economic, and politic organisation of the Rwandan society.

In general, the legal profession as a whole has not played an active role in the protection and enforcement of human rights. This is not to suggest that individual lawyers have not taken up controversial or politically sensitive human rights cases. Some lawyers have indeed taken up cases such as those of torture and inhuman treatment. However, since they do not operate as an organised body to promote and protect human rights, little has been done in this regard. They, for example, did not protest the arbitrary expropriation of individually owned properties and businesses, the mass detention of people without trial over the years, and the erosion of press freedom. Examples of this kind are endless.

Other areas that have been affected are the education of the public about their rights and legal assistance to the poor. In this latter area, impoverished Rwandan people have been left without hope. The accused has a right to legal counsel as guaranteed in the Constitution, the *Code de Procédure Civile et Commerciale,* the *Code de Procédure Pénale*, and in the Organic Law on the organisation of prosecutions for offences constituting the crime of genocide or crimes against humanity since 1 October 1990 (article 36), but not at government expense: no *pro bono* legal aid is provided for and there has never been a Department of Legal Aid in the Ministry of Justice.

2.9 The socioeconomic crisis, underdevelopment, human rights and the youth

2.9.1 Economic crisis and under-development

The argument contained in this section is that the Rwandan State has failed to take steps to ensure the realisation of economic and social rights. The economic crisis has affected economic and social rights and the ability of persons to enforce the guaranteed civil and political rights. The failure of the State to provide adequate education to the majority of Rwandans is also analysed as a social factor that has played a large role in the Rwandan tragedy.

[1082]For example, just after completion of their studies at the University of Rwanda, a number of the author's classmates were appointed judges, others prosecutors, whereas others occupied high positions in law practice without any prior professional training.

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There is no doubt that the economic crisis and underdevelopment existing in Rwanda make the attainment of human rights difficult. Although the Constitution does not incorporate economic and social rights, these rights are nevertheless just as important as the guaranteed civil and political rights, as they make the latter more meaningful.[1083] Rwanda, acceded to the International Covenant on Economic, Social and Cultural Rights of 1966. It is thus bound to take steps to the maximum of its available resources to ensure the progressive realisation of the rights recognised in the Covenant. These include the right of everyone to work; to social security; to education; to an adequate standard of living, including adequate food, clothing and housing; to the enjoyment of the highest attainable standard of physical and mental health; and to take part in cultural life, etc.[1084]

Rwanda has fallen far short of attaining most of the above rights in the past thirty-six years. The Belgian colonial authorities did little to promote African education so that Rwanda had less than five university graduates and a tiny number of people with Secondary School diplomas at independence. Vast progress has been made in the education sector since independence, as hundreds of primary schools, secondary schools, technical and vocational schools and one University have been built.[1085] Despite this vast progress the rate of literacy is only 56%, with a higher illiteracy rate among women (50%) than among men (37%).[1086] Moreover, not every child has been able to attend basic primary school because there, in fact, are not enough schools to accommodate everyone. Only half of all children who enter grade one finish primary school and only about 10% of students who finish primary school go on to secondary school, as primary schools vastly outnumber secondary schools.[1087] Owing to the limited number of institutes and universities, not every secondary school graduate has access to higher education. Thus, a vast number of children drop out of the education system and (the lucky ones) go to the employment market at very tender ages.

[1083]None of the Constitutions, from independence through 1991, has ever incorporated economic and social rights.

[1084]ICESCR, particularly art. 2, 6, 7, 9, 11, 12, 13 & 15.

[1085]About 60% of the primary school age population attended school in the late 1960's. An estimated 85% of all boys and 65% of all girls who reached schoolgoing age each year enrolled in the first year of primary school. In 1967-68, there were 6,195 boys in 34 boys' schools and 10 seminaries and 2,647 girls in 20 girls' schools. *Secrétariat d'Etat au Plan National de Développement, Direction de l'Office Général des Statistiques, Bulletin de Statistiques, No. 17, April 1968, p. 2-5.* The World Bank estimates that 71% of primary age Rwandans attended school in 1991, compared with 68% in 1970. However, only 8% benefited from secondary and less than 1% from tertiary education. *World Bank, Report and Recommendation of the President of the International Development Association to the Executive Directors on a Proposed Credit for SDR 67.5 Million to the Rwandan Republic for a First Structural Adjustment Program, Washington DC, 1991.*

[1086]World Bank, Report and Recommendation of the President of the International Development Association to the Executive Directors on a Proposed Credit for SDR 67.5 Million to the Rwandan Republic for a First Structural Adjustment Program, Washington DC, 1991.

[1087]Sadiki, Connaissances et Compétences Techniques, at 267.

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Unfortunately, not many of these children can get jobs because the economy has been in steady decline since 1980, owing to the drastic fall in the price of coffee and tin ore, high oil prices, corruption and the ethnic strife in Rwanda and in the Great Lakes region.[1088] Agriculture, which might have provided an alternative source of employment, has also been in decline because of the leaders' disastrous agricultural policy.[1089] Authorities failed to transform the subsistence agriculture into a market agriculture likely to create jobs, and many of the unemployed semi-literate youths who live in urban areas have turned to crime, prostitution and drugs.[1090] And many are very susceptible to manipulation by unscrupulous politicians. The MRND often recruited such youths into its youth wing, and used them to terrorise its opponents.

Apart from the decline of the economy, other factors also contributed to the abandonment of the youth to their own fate. One of them was the inadequacy of the education system. As indicated earlier, despite the political independence obtained in 1962, Rwandans were not professionally prepared for the task of "taking the destiny of the country into their own hands". It was therefore necessary to appoint Belgians in different services due to the experience they had acquired in the administration of colonial Ruanda-Urundi. As a consequence, the orientation given to education was no different from what it was during colonisation. The curricula were verbatim copies of Belgian education without any reference to the Rwandan realities and were meant to prepare the pupils for secondary education which benefited a tiny minority of pupils who had managed to finish primary school, whereas the majority had "to return to the land" where they were not prepared to live. Professor *Herny* found that, until 1976, the Rwandan system of education had formed people who were not economically, socially or culturally adapted.[1091]

As a remedy, the government instituted a reform in 1979 in order to democratize basic education (by ensuring schooling of all children, reduction of the number of pupils who abandoned school and elimination of regional inequalities) to orient primary and post-primary education towards economic development[1092] and to integrate and promote the national culture in the *curricula*.[1093]

[1088]Sellström and Wohlgemuth, 1996.

[1089]Ibid.

[1090]Ibid.

[1091]Herny, P., L'enseignement dans les pays pauvres. Modèles et propositions, Paris: L'Harmattant, 1979, p. 166.

[1092]Hanf, T. *et al.* used the French words *"ruralisation de l'enseignement primaire et post-primaire"* and explained that *"ruralisation"* does not mean in any case a purely agricultural education but rather an education oriented towards the mastery of problems that occur in rural areas. They contended that such an education contains elements of theoretical mastery of the surrounding world, as well as the knowledge and skilfulness of arts and agriculture. See Hanf, T., et al., Education et développement au Rwanda, München: Wltforum Velrlag, 1974, p. 166.

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In countries like Rwanda, where 96% of the population live in rural areas, these objectives were justifiable and defensible. Basic education is a human right and *"ruralisation"* of primary school, the only school accessible to the majority of children, was most reasonable in a country where the most important labour market was agriculture.

As a characteristic of the *"ruralisation"* of the *curricula*, primary education was aimed at consolidating basic knowledge and developing the psychophysical aptitudes necessary to live in the rural area. For this reason, practical education was to be provided in addition to general education, in order to develop in the children the habit of working in teams.[1094]

After the primary education, children who did not go on to secondary school received post-primary education in institutions called *Centres d'Enseignement Rural et Artisanal Intégré (*CERAI*)*. These centres were meant to form and produce a technical labour force integrated to the specific needs and resources of rural areas over a period of three years.

In practice, however, a number of weaknesses became apparent. Firstly, although an effort was made to provide all children with schooling, this objective was not attained. The Ministry of Primary, Secondary and Integrated Crafts Education had, for example, expected a schooling rate of 85% for the period between 1988 and 2001. But in the 1989/1990 school year, only 74.1% of seven year-old children attended school, whereas the net rate for primary schooling was 62%.[1095] This shows that twenty years after the reform had started, a quarter of the children did not have access to school, and one third of all the children of school-going age were not able to attend any school at all. They had no chance to improve their standard of living through access to the modern economic sector.

Secondly, the way the *"ruralization"* of primary education was carried out left much to be desired. The reform extended the six years of primary education in the previous system by two years. There was no change in the curricula for the first six years of education that were meant to eliminate basic illiteracy and to obtain general theoretical knowledge, while the two added years were meant to offer training in practical work, which comprised crafts and agriculture. Thus, contrary to expectations, primary education was not *"ruralized"* but, to quote *Hanf* and *Wolff*, *"ruralization"* was rather added to

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[1093]Sadiki, Connaissances et Compétences Techniques, at 211.

[1094] Id., at 213.

[1095]Hanf, T. and Wolff, J., L'enseignement primaire au Rwanda, Working paper, 1992, p. 3. One should notice that their findings are not very different from those of the World Bank mentioned in World Bank, Report and Recommendation of the President of the International Development Association to the Executive Directors on a Proposed Credit for SDR 67.5 Million to the Rwandan Republic for a First Structural Adjustment Program, Washington DC, 1991.

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it.[1096] As a result, this partial and artificial *"ruralization"* had a minor effect on the whole system.

Thirdly, regarding the CERAI, education was general and theoretical, while practice occupied less than 50% of the weekly timetable. This was insufficient for a truly agricultural or crafts education. *Sadiki* affirms that the technical knowledge the pupils gained during the three years was certainly inferior to what they would have learned should they have actively participated in the daily activities of their families.[1097] Moreover, as observed by *Erny*, most teachers suffered from the "white collar" syndrome and were loath to devote themselves to a truly practical education. He put it that,

> *l'instituteur à qui l'on impose un programme de type agricole se sentira rabaissé et mettra à profit la moindre faille dans le système pour revenir à un type d'enseignement plus "scolaire", plus intellectuel, et ainsi se valoriser lui-même. Comme d'habitude on évalue les élèves à partir de leurs connaissances livresques, et non de leurs habiletés techniques, un maître qui favorise les premières au détriment des secondes part toujours gagnant.*[1098]

This explains why the CERAI trained craft handymen and provided marginal agricultural initiation that was not helpful in rural areas.

Fourthly, there was a wide divergence of perceptions of the CERAI objectives between the State, parents and pupils. There was no change in parents' and pupils' perceptions of a school. As in the past, they believed that the school's role was to propel the pupils from their original milieu and not to fix them there. And indeed, through its structure, organisation and *curricula*, the CERAI was a school. However, the State expected the reintegration of pupils in their rural milieu after they had acquired the best knowledge in agriculture, cattle breeding and crafts, which would have been helpful to them and to the nation. "They were expected to play a multiplier's role in their milieu".[1099] These conflicting expectations entailed loss of consistency of the CERAI's objectives. After three years of training, graduates were neither able to fit into their original milieu - which was not their intention - nor into the modern labour sector for which they were not adequately prepared.

Fifthly, the number of trained teachers was insufficient. Considering that the 1979 reform was centred on the *"ruralization"* of the *curricula*, the need for special teachers with motivation and appropriate methodology was obvious. The country, however, lacked such teachers. As *Sadiki* points out, 72% of CERAI teachers were not trained. Some had attended teachers' training schools where

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[1096]Id., at 4.

[1097]Sadiki, Connaissances et Compétences Techniques, at 219.

[1098]Erny, L'enseignement dans les pays pauvres, at 188.

[1099]Hans and Wolff, L'enseignement primaire au Rwanda, at 53. Author's translation.

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only disparate professional and pedagogic education was given and this was not adequate to efficiently train and supervise the CERAI pupils.[1100]

In its efforts to try to alleviate some of the weaknesses, the government revised the structure of primary education in 1992 by suppressing the seventh and eighth years.[1101] Because of failing to *"ruralize"* the first six years, primary education was freed of its already inefficient added *"ruralization"* and, thus, its practical aspect, and pupils were cut off from their milieu. With this reversion to the pre-1979 reform, primary education was no longer meant to integrate pupils with their milieu but to prepare them for secondary education. As the latter was open to only 20% of primary school graduates, the overwhelming majority was left helpless in their original milieu.

The revision also contributed towards the aggravation of social inequality since the twenty per cent that could be accepted for secondary education were the only ones who would later have the chance to find an occupation that enabled them to improve their living conditions.

Because of the economic crisis, which was characterised by low production, hyper-inflation, high budget deficits, massive unemployment and underemployment, the scarcity of foreign exchange and an external debt of over 7 billion dollars, the vast majority of the population lives in abject poverty. The gross national product *per capita* in Rwanda in 1993 was *US $* 200 compared with *US $ 330* in 1989.[1102]

Many people live in overcrowded, ramshackle huts in filthy squatter settlements, which often lack clean water, electricity, adequate schools and medical facilities.[1103] Most medical establishments lack adequate drugs and doctors and thousands of children die of malnutrition.[1104] Many people lead a hand-to-mouth existence, as even those in employment are not paid a living wage.[1105] Because many living places are filthy and unsanitary, there are frequent outbreaks of such deadly diseases as cholera, bilharzia, dysentery, malaria, typhoid and respiratory infections which claim thousands of lives every year.[1106] The infant mortality rate is 117 out of 1000 live births and life expectancy at birth

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[1100]Sadiki, Connaissances et Compétences Techniques, at 222.

[1101]Id., at 223.

[1102]The Economist Intelligence Unit, Rwanda and Burundi, 1994-1995, London, 1995.

[1103]Id.

[1104]Statistics show that in 1992, 1.5 million Rwandans were without access to health services; 2.6 million were without potable water, and 3.2 million without sanitation. Ibid.

[1105]Ibid.

[1106]Ibid.

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is 53.1 years.[1107] As if this were not enough, the population has increased at an annual rate of 3.7 percent at a time when the economy has been registering little or negative growth.[1108]

The level of poverty is even greater in the rural areas, where not less than 94.6% of Rwanda's population of about seven million live.[1109] Schools, hospitals, safe water and government social services are almost non-existent in many rural areas.

It is apparent that the vast majority of the people in Rwanda are denied the economic, social and cultural rights guaranteed in the International Covenant on the Protection of Economic, Social and Cultural Rights, not necessarily by deliberate government action but mostly because of the overall conditions of underdevelopment and economic malaise existing in the country. These conditions have doubtless made enjoyment of civil and political rights by the majority of the population rather hollow.

2.9.2 The desperation of the youth and the 1990-94 crisis

The tragedy that Rwanda has endured since 1990 and which culminated in genocide in 1994 has exacerbated the Rwandan human rights situation. It was seen that the newly born pluralism was compromised, misunderstood by the population and infiltrated by antagonistic forces. Within some months of the tragic 1994 year, thousands of innocent children, women and men were savagely massacred by these antagonistic forces and over two million people took refuge in neighbouring countries where they lived in camps under inhuman and degrading conditions.

In this submission, it is proposed that the inadequacy of the education system and the depreciation of family education have played an important role in the Rwandan tragedy. Considering that the youth represents 65% of the Rwandan population and the determinant role they played in the tragic events amounting to massacres, pillaging, rape and banditry, the weakness of the Rwandan education system was one of the profound causes of the tragedy. It has been shown that the inadequacy of primary and post-primary education systems had produced individuals who were maladjusted and incapable of playing an efficient role in rural or urban milieus. In a deteriorated economic environment, with ill-adapted land tenure, an unwholesome political climate, and the 1990

[1107] Ibid.

[1108] Ibid.

[1109] Ibid.

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war, the youths became frustrated and worried about their future[1110] and gave themselves over to criminality and barbarity.

2.9.2.1 A deteriorated economic environment

Compared to its neighbouring countries, Rwanda enjoyed considerable economic development within three decades, owing to the efforts of its hard-working population and the generosity of its donors. The manifest signs of this economic progress were the stability of the currency, the increase of the gross national product by 4.9% per annum from 1965 to 1989, one of the weakest inflations of the continent (less than 4% per year) and minor importation of foodstuffs, despite strong demographic pressure.[1111]

However, this modestly bright picture contained shadows. After 1980 the economy started shrinking with the collapse of world coffee, tea and tin prices and this led to the closing down of tin mining in Rwanda in 1987.[1112] As 90% of receipts in foreign currency was generated by these three commodities, this blow struck very hard.

Furthermore, due to the drought in most regions of the country, especially in the south, the production of foodstuffs decreased considerably and the population in rural areas met with more and more difficulties related to food, health care and school fees for their children.[1113]

The political stability followed the curve of that shrinking economy almost exactly. As Rwanda is a very poor country built on peasant subsistence agriculture, little surplus value can be extracted directly from the peasant mass. For the elite of the MRND (and later RPF) regimes there were three sources of enrichment: coffee, tea and tin exports (the latter being suppressed before the arrival of the RPF), and creaming off foreign aid. Since a fair share of the first had to be allocated to running the government, the shrinking of sources of revenue left only the second as a viable alternative by 1988 through 1995. Hence there was an increase in the competition for access to that very specialised resource, which could only be appropriated through direct control of government power

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[1110] The frustration and worry of the youths was expressed through their program on Radio Rwanda, *Ejo Nzamerante*. See infra note 1085.

[1111] Chossudovsky, M., Les fruits empoisonnés de l'ajustement structurel *in Le Monde diplomatique, No. 488, Nov. 1994, p. 21.*

[1112] République Rwandaise, Mémoire présenté par le Rwanda à la Deuxième Conférence des Nations Unies sur les Pays les Moins Avancés, Paris, 3-14 Sept. 1990, p. 3.

[1113] Prunier, The Rwanda Crisis, at 84.

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at high levels.[1114]

As shown in studies by *Gasana* and *Nsengimana*, the national wealth benefited a tiny number of people privileged by the regime and a militarist-commercial elite. The peasant class was socially and economically excluded. Owing to an endemic famine and the non-access to land of the new generations, a number of people emigrated to Tanzania as ecological refugees towards the 1980's. An increasing number of the youths lapsed into violence, criminality, banditry and exodus to urban areas where they lived a down-and-out life.[1115]

The reliance on foreign aid, small at first, had become significant by the late 1970s and enormous by the late 1980s through 1995. According to the OECD, foreign aid, which had represented less than 5% of the gross national product in 1973, had risen to 11% in 1986, 22% in 1991; and 39% in 1997.[1116] Generally, the pauperisation marginalized the majority of the population and, thus, the youth almost entirely. Added to the strong demographic pressure and serious deterioration of the production of foodstuffs, the consumption per inhabitant decreased, while a privileged minority accumulated land, wealth and social prestige. This phenomena of great social inequality was one of the factors of the extreme weakness of the Rwandan society and the unprecedented violence which swooped down on the country.[1117]

The deplorable fact was that the traditional remedy prescribed by the Bretton Woods institutions (devaluation of the currency, reduction of personnel, privatisation of public firms and services, suppression of aid to farmers, etc.) failed and aggravated the situation. Unlike the period before the Structural Adjustment Programme, the inflation increased and national revenues decreased[1118] and social inequality, as well as poverty, was aggravated. Unfortunately, the State failed to take steps in order to evade the negative effects of the Structural Adjustment Programme.

2.9.2.2 An ill-adapted land tenure

As indicated, the successive constitutions guaranteed the right to property to every person. Following the politico-economic situation prevailing till the beginning of the sixties, this measure set the

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[1114]Ibid.

[1115]Gasana, J., and Nsengimana, N., Bâtir une nouvelle espérance pour le Rwanda, working paper, 1995, p. 5.

[1116]The Monitor, 31 December 1997.

[1117]Gasana and Nsengimana, Bâtir une nouvelle espérance pour le Rwanda, at 5.

[1118]Chossudovsy, Les fruits empoisonnés de l'ajustement structurel *in Le Monde diplomatique, No. 488, Nov. 1994,* at 21.

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individual and household free from the community's ascendancy and mostly from the economic domination prevailing in the *ubuhake* system. However, the land had lost its social function through the individualistic and liberal nature of that autonomy. The concept of private right to land was a factor in the disintegration of clanic and family groups because it led to excessive parcelling out of land, developed scattered housing and fragmented living arrangements. As a result, farming land was degraded and progressively became unsuited to agriculture.[1119]

One of the consequences was the miniaturisation of the arable area through the parcelling of land by inheritance, transfer and concession. The arable area of the majority of the agricultural units, has become smaller than one hectare and decreases continually in proportion to an excessively expanding population.[1120]

Besides the miniaturisation, there has been what *Jean Marc Ela* calls *"cultivateurs en souliers vernis"*[1121], literally meaning "cultivators wearing shoes with a brilliant shine". The continuing impoverishment of the rural area has forced peasants to sell part of their land in order to pay school fees for their children. The land is bought at ridiculous prices by tradesmen, civil servants and politicians who finally accumulate large cultivable areas while peasants and their families become destitute. The lucky ones become farmhands on their former land.[1122] Land had been the only source of income in the rural milieu, but the resultant scarcity has made it inaccessible to the youth. It is impossible for them to acquire even a single plot so as to make a living for themselves.

2.9.2.3 An unwholesome political climate

Towards the end of *Habyarimana* regime, following the coming down of the Berlin Wall and dictatorships in Eastern Europe, the move towards democratization in Africa had led to the formation of about seventeen political parties in Rwanda. The youth, enticed by promises of socioeconomic change and better prospects, joined political parties *en masse* and became easy prey to any manipulator. Instead of proposing political and socioeconomic programmes as an alternative to the

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[1119]Runyinya, B., Innovations agraires et gestion des espaces ruraux au Rwanda, Thesis, University Foundation of Luxembourg, 1985, p. 136.

[1120]One of the major problems of Rwanda has been its galloping demography (3.7%) which has increased the population density to more than 300 inhabitants per square kilometre. In some regions like Butare and Gisenyi it has even reached 800 inhabitant per square kilometre. See Sadiki, Connaissances et Compétences Techniques, at 235.

[1121]This is a phenomena observed everywhere in Africa, particularly in Ivory Coast, Nigeria and Cameroon. See Ela, J.M, "Bourgeoisie verte contre paysans" *in Le Monde diplomatique, Nov., 1981.*

[1122]Nshimyimana observes that the land owned by those rich people is only partially exploited. Nshimyimana, A., Ejo Nzamerante?, Radio Rwanda, May 1989.

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prevailing system, however, leaders of opposition parties, many of them opportunists, devoted themselves to denigrating and unseating the ruling authorities. Through their opportunism, much time was wasted in quarrelling for the sharing of ministerial and managerial posts.

They were able to use the media, *inter alia,* to manipulate the youth. In Rwanda, one family out of two has a radio and as democratization was accompanied by a number of independent newspapers[1123] publishing anything about anyone it was not difficult to attract the attention of the youth with certain issues. The majority of Rwandans being peasants, they characteristically accepted whatever was published as the truth. The existing radio stations broadcasting in *Kinyarwanda*, the state-owned Radio Rwanda, the private Radio *Muhabura* of the RPF and Radio *Télévision Libre des Mille Collines,* played an important role in intoxicating the youth. It has also been mentioned elsewhere in this dissertation that radio stations played a role in the indoctrination and enrolment of the youth in armed groups.

For most of the unemployed and frustrated youth the army provided employment as well as a reason for gratitude to the society that was coming into being. Being in uniform and possessing a gun represented power and enrichment. That is particularly why the youth joined militias.[1124] Many of them received some military training. In Kigali they manned roadblocks and took part in the house-to-house searches for the sake of killing and/or looting the victims' houses. They took pride in being seen by journalists as 'one of the boys' and being able to protect their own house against looters.[1125]

Apart from the selective massacres in the civil war, socioeconomic violence also increased considerably. The absence of any perspective led the hopeless youths to generalised banditry, criminal violence combined with militarist-political attacks that took the form of particularly pernicious violence. This was witnessed by *Soulanet* who aptly put it that,

> *une pareille débauche de crimes a quelque chose d'irrationnel ... cette rage de tuer s'est emparée d'un aussi grand nombre de gens ... . La haine n'était pas seule en cause. Elle paraît avoir été utilisée, exacerbée pour chauffer à blanc des gens pétris de rancoeur et de frustrations parce qu'ils ont été exclus de la vie sociale, économique et culturelle, bref de tout ce qui fait l'équilibre des individus en leur donnant leur place dans la société. Ce n'est pas le simple fait du*

[1123]There were about 16 newspapers in 1993. See Sibomana, Gardons espoir pour le Rwanda, at 85.

[1124]Godding, P. and Musabyimana, P.: "La jeunesse au Rwanda: quel avenir?" *in Dialogue, No. 176, June-July, 1994, p. 59.* In reaction to RPF's recruitments and in order to counter increasing political intimidation, political parties had formed militias: e.g. *Interahamwe* of MRND, *Inkuba* of MDR, *Abakombozi* of PSD, and *Impuzamugambi* of CDR.

[1125]La Libre Belgique, 24 May 1994; Aubenas, F., 'L'exil doré des profiteurs Rwandais au Zaïre' *in Libération, 30 July 1994.*

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hasard si les plus violents parmi les miliciens sont issus de ... dépotoir de toutes les misères.[1126]

2.10 Conclusion

Hutu elites who took over were unprepared for a system of government that had never been practiced in colonies and they were not committed to nation-building and constitutional government. As the colonizers had not managed to plan or organize an orderly transfer of power, it is not surprising that the elites that took over power after independence were acquisitive, expropriationist, propelled mainly by the desire for private accumulation, and resorted to ethnic hunting and human rights violation rather than nation-building. Thus, issues of socialization of power, constitutionalism and democracy took second place quite early in the post-colonial era. Instead, what occurred was a rapid decline in the operation of governmental structures and processes as private took the place of public goals, and local or sectarian interests overshadowed national concerns.

Because of that fact, the Rwandan state at independence was not a constitutional state. Rather, it was a "constituted" State, one erected on pillars that were not fashioned out of past experiences or future aspirations. As constituted, the machinery of the state was not part of the shared experience of Rwandan people. It would therefore have been a miracle if independence arrangements had survived, leave alone fostered constitutional and democratic practices.

Inherently elaborate on paper as it may have been, the constitutional format which was established at independence was bound to and did indeed collapse. The collapse of the constituted State was rapid and virulent. That is why, within a span of 35 years, the country had gone through a number of traumas that led to the genocide.

The Rwandan genocide stands alone in the way its organizers aimed to mobilize mass participation in murder. Far from hiding their objective, they advertised their goal of exterminating the Tutsi citizens of Rwanda in meetings, through the press and over the radio. They exhorted Hutus to join the killing campaign, insisting that it "concerned everyone." They carried out the worst massacres in broad daylight and they left the dead in full view in many communities.

By focusing fear and hatred on the Tutsis, the organizers hoped to forge solidarity among Hutus. But beyond that, they also aimed at creating collective responsibility for the genocide. People were encouraged to kill together, just as soldiers in a firing squad are ordered to discharge their weapons simultaneously so that no one should bear individual or total responsibility for the execution. "No one person killed any one person," said one of the participants.

[1126]Soulanet, M., Vivre jusqu'à demain. Une mission au Rwanda, Paris-Montpelier, 1994 quoted in Reyntjens, L'Afrique des Grands Lacs en crise, at 8.

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The leaders of the genocide, experienced at wielding power, knew how to use the state machinery and their network of personal contacts to mobilize large numbers of people. They expected to succeed and had planned carefully for the operation. With their quick, ruthless murders of political opponents that began on April 6, they intimidated the remaining dissidents. Then, strengthened by their apparent acceptance as a legitimate government by the international community, they pushed ahead with a speed and ease that may have exceeded their own expectations. By two weeks into the campaign, they had slain hundreds of thousands of Tutsis and squashed any significant open dissent.

But ultimately they failed in their goal of total mobilization for extermination. Hundreds of thousands of Hutus who lacked the courage or resources to openly oppose them resisted passively, most by withdrawing from political and community life, a few by working within the system to restrain its excesses.

Among those who did carry out genocide, actors participated in many ways: from the national leaders who aimed to extirpate the Tutsis down to the level of ordinary people who showed no taste for violence but wanted only to enrich themselves through pillage. As the roles varied, so did the motivations of the actors, some moved by virulent hatred, others by real fear, by ambition, by greed, by a desire to escape injury at the hands of those who demanded they participate, or by the wish to avoid fines for nonparticipation that they could not hope to pay.

The fact that we cannot afford to forget when we try to understand the genocide is: when Hutus killed Tutsis in the genocide, who did they think they were? And whom did they think they were killing? To some extent, and considering certain parts of this dissertation, they thought they were the sons of the soil killing aliens seeking to grab power. They thought they were natives killing settlers.

Lenin once wrote to *Rosa Luxembourg* that she had become so preoccupied with fighting Polish nationalism that, like the rat, her eyes could see nothing but cats. The world of Hutus and Tutsis had become like the world of the rat and the cat. For the rat, there is no animal more dangerous than a cat; no lion, no tiger, no elephant, just the cat. And for the cat, there is no animal more delicious than the rat. We cannot dismiss the social and political gains of the 1959 Revolution: from land reform to some reform of governance. But we can also not overlook the limitation of that revolution.

The author's point is that the 1959 Revolution failed to overcome the political legacy of colonialism. Instead of challenging, it embraced the political identities colonialism created, of the Hutu as the indigenous *Bantu* and the Tutsis as the alien *Hamites*. It failed to recognize that colonialism was not simply an economic system that had expropriated the native; it was also a political system that had poisoned political life by politicizing indigenousness.

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The October 1990 RPA invasion of Rwanda was testimony to a citizenship crisis on both sides of the border. Genocide is not carried out against neighbors who we consider to be legitimately living on the same soil, no matter what other differences we may have with them. Genocide is only carried out against those whose very presence in the political arena is considered illegitimate, whose very bid for power is considered illegitimate. Genocide, regionalism, states of emergency, hindrance of civil society and other stratagems used by absolute rulers lead to the question to know who owns the country.

It is a fact that occupation of the state brings concrete rewards in the form of control over public goods. The allocation of public goods (education, welfare, police protection), as opposed to private goods, must meet the following criteria: jointness of supply (the use of such goods by any one citizen must not preclude or prevent another from using them); and non-excludability (no criteria should exist whereby some citizens are allowed to use such goods and others are prohibited from doing so). One of the very reasons that a state can justify its societal hegemony and market its own set of survival strategies as superior to those of other societal organizations lies in its claim to be the only body capable of providing goods collectively which cannot be obtained through private endeavor. Yet when an ethnic group does gain control over the state and starts distributing public goods on the basis of ethnic preferences, jointness of supply is undermined (the resources of the state are used to educate, care for and protect one set of citizens) and non-excludability is violated (ethnicity emerges as the dominant criterion for exclusion).[1127] That is how one of the most basic justifications for the existence of the Rwandan state itself had fallen away.

The other fact is that control of the state gives access to the regime. Changes in constitutional rules, the most vital component of the regime, can result in consolidating control of the state and forestalling future alternation of regime incumbency. Such changes are typically contemplated, and if possible, executed. Should this be successfully accomplished, the state ceases to be an autonomous actor and the state, the regime and the incumbent ethnic group coalesce into a single unit of hegemonic social control. When ethnic outsiders try to distance themselves from such a state, the sphere of autonomy typically offered by the state to civil society is unlikely to be considered sufficient. Furthermore, the incumbents of such a state are likely to try to dismantle such boundaries between state and voluntary organizations in their attempt to assert state control over ethnic competitors. It is under such conditions that the Rwandan state has not been viewed as the guardian of civil society, mostly since the legal framework within which some organs of civil society operated forbade them from engaging in political activities or publicly espousing political views. As such

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[1127] Rabushka, A. and Kenneth, A.S, Politics in Plural Societies – A Theory of Democratic Instability, Columbus OH:

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political discourse in Rwanda has always been conducted as if civic organizations are instruments of the state in respect of grass-roots development. Indeed the government went so far as to establish mechanisms for the coordination of these bodies so as to ensure that they operated strictly within state policy.

Ethnic and regional exclusion and the hindrance of civil society in Rwanda also involve the issue of citizenship. Normally, a strong autonomous state can be identified by the extent to which citizenship, rules of social control and resulting survival strategies are applied to individuals within the state in a non-discriminatory manner. The state assumes a neutral stance towards social differentiators, such as ethnicity in determining criteria for membership of the state, as well as in determining the substance and quality of such membership. Citizenship of equal value is available to all sectors of society. Yet the salience of citizenship over other competing forms of social membership is ensured. To democratize a strong, autonomous state the regime needs to be adapted to allow for citizens to get access to free and unrestrained participation in, and contestation for, the political power within the state.

To democratize a strong ethnic state the contest for hegemony needs to be dissolved. This entails, *inter alia*, the further strengthening of the state, as it is the only agency that can ensure that the value of citizenship transcends that of other contending social loyalties such as the ethnic group. For the state to supplant the ethnic group as the terminal unit of political loyalty, agreement has to be reached on the substantive issues involved. All of these center on what the appropriate unit for domestic politics should be. Questions on the substantive content of nationhood and/or peoplehood and the collective "self" that is to be accommodated within the sovereign state have to be settled. From this agreement must follow mutually accepted yardsticks for establishing who should be treated as citizens and subjects. This entails the first step towards dismantling the ethnic and even regional character of the state.

For membership of the state to become more valuable than membership of the ethnic or regional group also requires that the allocation of public goods by the state be made in a neutral way: the criteria of jointness and non-excludability must be upheld in an unscrutable manner. This again requires that the administrative personnel of state departments themselves be informed by a collective ethos of the public servant as a civil servant who serves all citizens of the state equally well, and on the terms set by the laws of the state and not on those set by other social organizations. For an ethnic or regionalist state to be reconstituted in so fundamental a manner requires that the state acquire the attributes of an autonomous social organization, which, in competition with other

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Charles E.M, 1972, p. 84, 85.

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units such as ethnic groups, must be strengthened in its capacity to assert itself over societal competitors.

Recommending concerted state-building of this order towards securing democracy appears, at first glance, to run counter to what the Anglo-American intellectual tradition would advocate. This tradition identifies the state as the greatest threat to liberty and sees the containment of state power as the foremost priority in consolidating democracy.[1128]

Not only the strength of the state, but equally important, its autonomy, must be established. *Migdal* stresses the need for bureaucrats of the State to see themselves as part of an institution with interests which are not related to or derived from their own positions in and wider commitments to societally based organizations of which they may be members:

> Bureaucrats of the State, both those at the tops of agencies and the implementers in the field, must identify their own ultimate interests with those of the State as an autonomous organization.[1129]

This is seen as a crucial step in the building of autonomous strong states which "... can emerge only when the shared notion that there should be an autonomous set of state interests exists, and when bureaucrats believe those interests coincide with their own".[1130] State autonomy has not been met in Rwanda because state officials have not acted upon their own preferences but on those of ethnically and/or regionally based individuals or groups. Certain rules and practices have been absent, which could have insulated (but not necessarily isolated) the personnel of the state from the rest of society. Rules and practices which succeed in doing so give effect to what *Gellner* speaks of as "the strategy of gelding: the idea is to break the kin link by depriving the budding warrior/bureaucratic/cleric either of ancestry, or of posterity, or of both".[1131] In the agrarian polities of an earlier age a variety of techniques were deployed which

> ... included the use of eunuchs, physically incapable of possessing posterity; of priests whose privileged position was conditional on celibacy thereby preventing them from avowing posterity; of foreigners, whose kin links could be assumed to be safely distant; or of members of otherwise disenfranchised or excluded groups, who would be helpless if separated from the employing State. Another technique was the employment of 'slaves', men who, though in fact privileged and powerful, nevertheless, being 'owned' by the State, technically had no other legitimate links, and whose property and position could revert to the State at any time...[1132]

[1128] For details, see Ake, C., 'The Case for Democracy', *in African Governance in the 1990s: Objectives, Resources and Constrains', Workin*g Papers from the second Annual Seminar of the African Governance Program, The Carter Center of Emory University, Atlanta, Georgia, March 23-25, 1990, p. 5.

[1129] Ake, C., 'Rethinking African Democracy', *in Journal of Democracy',* vol. 2, no. 1, Winter 1991, p. 32-44 at 38.

[1130] Migdal, Strong Societies and Weak States, p. 6 (footnote 5), 274, 275.

[1131] Gellner, E., Nations and Nationalism, London: Cornell University Press, 1983, p. 15.

[1132] Ibid., p. 15.

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The application of some of these techniques is not likely to be considered with great enthusiasm by state-builders (and their personnel) in the late twentieth century, especially when the aim is to foster esprit de corps! Consequently, constitutional rules are the major remaining mechanisms available to post-genocide state-builders for creating the conditions of “gelding” or breaking the "kin link" which lies at the root of favoring one's own ethnic or regional group over another.

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Chapter Three

The Post-Genocide State and the Problem of Reconstruction

3.1 Introduction

> Article 1: The top man is always right. Article 2: If, by any chance, the top man is wrong, Article 1 enters into force immediately.[1133]

National unity, democratic institutions, human rights and repatriation of refugees were the main arguments put forward by the RPF when it launched the war on 1 October 1990. After its victory in the summer of 1994, the central problem was the kind of political system that would be chosen for governing the country. The new government sworn in on 19 July presented itself as a return to the *Arusha* agreement of 3 August 1993, which had been conceived not only as a 'Peace Agreement', but also as a constitutional law, providing a direct complement to the 10 June 1991 Constitution.[1134] In this chapter, an analysis is presented of whether Rwanda has changed or is likely to change into a democratic State with respect for human rights and the rule of law. The argument is put forward that the Tutsi government has failed to tackle the fundamental problem of peace, reconciliation and construction of a viable Rwandan State. Indeed, the RPF power has proved to be absolute and exclusive. It has put in place façade institutions while all the wheels of the State are controlled by a small militarist-civil oligarchy derived almost entirely from the Tutsi ethnic group. All other political sensivities have been marginalized and Hutus have become second-class citizens, some of whom have been used to build an amiable façade behind which lie absolutism, exclusion and elimination. The massacres of thousands of innocent people is evidence that the RPF can rule the country only by violence, particularly due to its lack of a sound social basis and political legitimacy. The most influential Hutus have to choose between submission, disappearance, and rebellion.

While no viable solution has been offered so far, mostly since even the international community, especially the United Nations whose role is the maintenance of peace and security in the world, has remained inactive, the last part of this chapter makes suggestions for ways in which the impasse can be broken.

[1133] Zairian (now Congolese) humour. Author's translation.

[1134] Kagame, interviewed by Radio Rwanda, 10 July 1994.

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3.2 Economic and social split

After the genocide, the security situation has exacerbated a tendency which predated the war. Given the fact that their life had been difficult in the hills and also given their higher level of education in colonial Rwanda, the Tutsis had tended very early on to move to the cities, where they constituted more than their overall 10 per cent of the population. But this trend was only in operation during the colonial period and under the Hutu Republic, and the majority of the Tutsis were still tillers of the soil. The massive slaughter of April-June 1994 almost completely destroyed the rural Tutsi community. The survivors huddled together in Red Cross camps for internal displaced persons (located away from similar camps for the Hutus) and most of them never went back to their hills after the RPF victory. These are the people who were resettled in the UN-sponsored resettlement schemes.[1135]

During and after the war around 600,000 Tutsis came to Rwanda from abroad, numerically roughly replacing their dead peasant relatives. But they were not the same type of people at all. They were mostly moderately well educated people and most of them had no notion of agriculture. Those who were not educated tended to be herdsmen and came back with large numbers of cattle. These people tended to settle in the *Mutara* plain of eastern Rwanda, encroaching on the *Akagera* National Park of which a large part has been turned into ranch land. But the educated ones were in the majority and they took over most of the urban properties (houses, shops, small factories) belonging to the Hutus who had fled. Most of the urbanised Hutus had fled, on one hand because some of them were among the leaders of the genocide, and, on the other hand, a great number feared the RPF more than did the hill dwellers, who felt they could weather the storm more easily in a rural environment. It has been out of the question for the Tutsi returnees to give these properties back to their "rightful" owners. Many Tutsis returnees of 1994 argue that these properties were built on land which belonged to them anyway and which the Hutus stole during the violent years of 1959-1964. Since the few present Hutu elite has been fearful of the Tutsi security apparatus, the trend has been not to press too hard for restitution of their properties and "the government has done little to make justice".[1136]

The result has been a dichotomised economy, with the Hutus on the land, working at subsistence farming, just as they were during the pre-colonial and colonial era, and a town-based monetary economy practically entirely in Tutsi hands. Not only is this economic dichotomy a problem for any

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[1135]Sadiki, Connaissances et Compétences Techniques, at 222.

[1136]Prunier, Rwanda: The Social, Political and Economic Situation, Writenet, July 1997, at 6.

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future rehabilitation and development of the country, it is also a major social and political problem. During the preceding Hutu regime, the Hutu elite had deep country roots. Every civil servant, right up to cabinet ministers and top army officers had relatives in the country. Every weekend people went back to the hills. They acted like small sultans and presented an exaggerated idea of their own worth. But at least they were there. The Hutu peasant in the hills entertained a complex relationship with his successful city cousins. He was told they ruled in his interest. He knew this was not true but he was flattered that they needed to lie to him in order to keep up the fiction of a "peasant-based democracy". They taxed him and forced him to work "for the public interest". He evaded the taxes when he could but accepted the fact that at least some of the forced labour was indeed in the public interest. They knew the men in power, even if indirectly. They had relatives nearby. The government ferociously extracted peasant agriculture surplus value from the toiling masses. But the men who stole that surplus value were *abana bacu (*our boys) and if one felt that he had to try to avoid the worst forms of exploitation the relationship was nevertheless always one resembling a domestic quarrel rather than a foreign feud. This picture was of course truer in the north, while, as seen, the southern Hutus were much more alienated from the government than their northern or eastern brethren were.

During the Tutsi regime, the situation became completely different. The Hutu peasant could have understood being ruled by a land-based Tutsi aristocracy. After all, this had been the case before 1959. But he could not understand being ruled by a town-based alien business class. As *Prunier* observes, *"these people are foreigners"* is a remark heard frequently.[1137] Or even, as another more educated person has said: *"they are like beings from outer space. They speak our language but they are different from us"*. This, by the way, is a comment no Hutu would have thought of making about a Tutsi survivor of the genocide who lived in the country before 1994. In fact, despite the political problem prevailing in the country, Hutus and Tutsis in the hills had lived in harmony and had shared their daily lives by intermarrying, inviting each other to feasts, attending the same church, and sharing other daily activities. With time, as the traditional roles assigned to each ethnic group disappeared, it was not unusual to find Tutsis who were tillers of the soil and Hutus who were cattle herders. Without becoming perfectly the same people, most Hutus and Tutsis had developed community life to such an extent that killings would not have occurred if politicians had not manipulated members of their respective ethnic groups. But with the 1994 returnees the "us/them" feeling was strong. Even Tutsi survivors would at times use the same expression about their exiled

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[1137]Ibid.

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relatives who had come back.

In order to understand the problem one has to realise that the expression "exiled relatives who came back" is deceptive. The people who "came back" were not the same as those who had left. Thirty years had gone by and given African mortality rates, the vast majority of the exiles who came into Rwanda in 1994 were either raised or born abroad. Major-General *Kagame*, the country's strongman, "left Rwanda when he was two years old".[1138] The Hutu regime never talked about refugees because refugees had to be "allowed" back home. The expression used was *"les Rwandais de l'étranger"* (the Rwandans abroad), even in 1990, after the creation of the joint Rwando-Ugandan Committee for Repatriation.[1139] And *"les Rwandais de l'étranger"* legislation never allowed any of these people to come back to Rwanda, even for a short holiday or to visit relatives. Thus *"les Rwandais de l'étranger"* community grew up with a magical and unreal sense of Rwanda which had very little to do with the real Rwanda and much to do with their parents' and grandparents' stories and fantasies about the world they had left behind. After the genocide, finding a tiny, bloody, poor and ruined country was for many a great disappointment, which could turn them from idealism to cynicism and towards the hope for fast money.

For better or for worse, the 1959 Hutu regime had been a peasant regime. Not that it pretended to be a "peasant democracy" but rather that it was a peasant-based patrimonial oligarchy. Practically the majority of the pre-1994 city dwellers had grown up in the countryside. RPF rulers grew up in refugee camps and in cities. *Prunier* has written that "they are not only Tutsi they are 'aliens' in the double sense of being foreign-born and educated and of being urban people in a land where 96 per cent of the population are peasant farmers. The dominant feeling expressed by Hutu farmers when they speak about their new masters is - more than fear - a feeling of strangeness".[1140]

Halfway between the Hutu peasants and the Tutsi shopkeepers and small businessmen stand the Tutsi genocide survivors in their roadside resettlement schemes. The houses are built on tiny overcrowded plots, the inhabitants have no land to cultivate and they are located miles from urban services. The settlements are prefabricated rural slums in the middle of nowhere, with no economic base to support them. The NGO workers who work in them have estimated that gardening, poultry farming and crafts can support perhaps up to 25-30 per cent of the resettlement dwellers. Many of

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[1138]Nsengiyaremye, The unknown tragedy, at 71.

[1139]Guichaoua, A., Le Problème des Réfugiés Rwandais et des Populations Banyarwanda, Haut Commissariat des Nations Unies pour les Réfugiés, Geneva, May 1992.

[1140]Prunier, Rwanda: The Social, Political and Economic Situation, at 7.

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those are widows with dependants and they feel rather desperate. A common remark is: "All of us survivors are now in one place. This will make it easier for the Hutu to kill us during the next genocide".[1141] Although the government is supposed to be a "Tutsi regime" their lack of interest in these poor rural Tutsi is evident. They have very little to do with the new power elite, except when they are "lucky enough to have foreign-born relatives who can sponsor their entry into the new order of things", since, as shown in further developments, the country is in a state of complete absolutism.[1142]

3.3 Disregard of the constitutional order

The RPF government promised the institution of a State of law in Rwanda. It agreed to respect the Arusha Peace Accord. However, this has not been the case.

3.3.1 Disregard of the peace agreement

The '*Loi Fondamentale*' of 26 May 1995 shows that the RPF promise was only words and that the Peace Accord was interpreted in its favour. The *Loi Fondamentale* is rather a tricky and cleverly assembled constitutional statement, the seal of which hides the monolithic nature of the regime.

As seen, the fundamental law subsequent to the Arusha Peace Accord comprises the 1991 Constitution and the 1993 Arusha Peace Accord.[1143] Since the establishment of new institutions on 9 July 1994, significant gaps have become visible. For example, the Presidency became executive and the post of Vice-President was created. The members of the Transitional National Assembly expressed their satisfaction with this concentration of power in the hands of the victorious party when they voted in favour of the *Loi Fondamentale* on 5 May 1995. The law was promulgated on 26 May 1995[1144] and had retroactive power as from 17 July 1994. However, it contained no material provisions and was confined to identifying four constitutional instruments and their hierarchy: the 1991 Constitution, the 1993 Arusha Peace Accord, the RPF Declaration of 17 July 1994, and the *Protocole d'Accord* signed on 24 November 1994 between the RPF and 7 political parties in order to

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[1141] Ibid.

[1142] Le Tribun du Peuple, No. 109, 1996.

[1143] One could even say the Peace Accords because the Arusha negotiations were a long drawn-out process, lasting a year, and several different agreements (on army integration, on the status of refugees, on the duration of the transitional period) were signed along the way. It was only the formal crowning of the whole process which took place on 3 August 1993.

[1144] J.O., 1995, No. 11, 1/6//1995.

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establish the Transitional National Assembly. According to Article 2 of the *Loi Fondamentale*, the *Protocole d'Accord* is the most important instrument in the hierarchic order, followed by the RPF Declaration, then the Arusha Peace Accord and, lastly, the 1991 Constitution. According to Article 1 of the *Protocole d'Accord*, however, the political parties in government had agreed to adhere to the RPF Declaration that regulates the establishment of institutions. As it was incorporated with the Protocole d'Accord, the RPF Declaration was logically at the top of the constitutional hierarchy, except in two instances that will be discussed with reference to its modification by the Protocol.

Some important modifications of the Arusha Peace Accord in favour of the RPF were introduced. First, regarding the Executive, the RPF Declaration provides for a powerful President. It has been indicated earlier that, in the Arusha Accord, the President of the Republic had become the formal head of State since he was supposed to execute decisions taken by other organs in all domains, especially by a cabinet he had no power to appoint.[1145] The object of the Arusha negotiations in this regard was to weaken President *Habyarimana,* mostly because of his obstruction of the transitional government of 1992-1993. For example, most of his power to appoint to higher positions was transferred to the Prime Minister;[1146] he was deprived of his traditional veto to sanction and promulgate laws and statutory orders,[1147]as well as presidential orders, adoption of which was entrusted to the cabinet.[1148] It was also the cabinet that had the competence to decide on the content of the messages to be announced to the nation by the President.[1149] In short, the powers of the broad-based transitional government were extended in order to combine the attributions of the head of State and those of the government.

In the RPF *Loi Fondamentale*, however, the presidency became executive again and even dominant. Article 2 provides for the President to be consulted and to approve the composition of the government. The first modification in this regard is contained in Article 6 of the *Protocole d'Accord* which provides that the President can initiate a cabinet reshuffle and dismiss the Prime Minister on the opinion of the National Assembly. Moreover, Article 6 provides that a new Prime Minister shall be nominated after consultation with political parties participating in the institutions. This gave more

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[1145] It was supposed to be appointed by the 'political parties participating in government' and the RPF. Protocol of 30 October 1992, art. 14.

[1146] Id., art 11 and 18.

[1147] Id., art 6 (d). In case he did not sanction and promulgate them within ten days after the constitutional court's ruling, the job was done by the Prime Minister as regards statutory orders, and the Speaker of the National Assembly, as regards the laws. Ibid.

[1148] Should the President refuse to sign a presidential order, the Prime Minister would do it. Id., art. 9.

[1149] Id., art. 12.

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liberty to the President than in the Arusha Accord. Article 3 of the *Protocole d'Accord* refers to Articles 53 and 54 of the Arusha Protocol on Power Sharing which stipulated that, where the Prime Minister or a Minister were to be replaced, they would be replaced with candidates from the same political party. Furthermore, Article 7 gives sovereign power to the President to make decisions in case the government is unable to do so.

Secondly, a post of Vice-President, combined with a ministerial portfolio, was created by Article 2 of the Declaration. However, the office of the Vice-President is not defined anywhere, and neither are his attributions, his appointment or removal from office. Article 9 of the RPF Declaration provided that "*Par consensus du Bureau Politique du FPR, Monsieur Pasteur Bizimungu accède aux fonctions de Président de la République".*

This provision said nothing about Major General Paul *Kagame* as Vice-President. As far as the constitutional order is concerned, this office is empty. But the fact that this function was entrusted to the strongman of the regime reinforced the presidential branch of the Executive. In other words, it would have been honorary if *Kagame*, Minister of Defense and President of the RPF did not occupy the position.[1150] More importantly, the combination of the vice-presidency with a ministerial portfolio in the hands of one person could arise in a serious contradiction: whereas the President (and, by analogy, the Vice-President) is not politically responsible before the National Assembly, Ministers are. Therefore, as Minister, General *Kagame* could be dismissed, whereas he could not be censured as Vice-President. The same contradiction existed under the *Habyarimana* regime before the December 1991 government in which *Habyarimana* lost the Ministry of Defense. However, during the *Arusha* talks, it was the RPF that argued *mordicus* that it was absolutely essential to balance the powers.[1151] Once it seized power, it would be seen that this argument was to be replaced by the concentration of power in the hands of the victorious party.

As regards the composition of the government itself, the RPF took the lion's share in the government which it controls, despite appearances. Article 3 of the RPF Declaration provided that ministerial portfolios the Arusha Peace Accord granted to political parties excluded from power sharing were to be taken over by the RPF. This means that the RPF would take the 5 portfolios allocated to the MRND. However, contrary to *Prunier*'s observation that the RPF had taken these "seats *en bloc*"[1152],

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[1150] By the time of printing this dissertation, Kagame has become the President of the Republic and he apparently has no intention of appointing a Vice-President, which confirms the author's contention.

[1151] Prunier, The Social, Political and Economic Situation, at 9.

[1152] Id., and *The Rwanda Crisis*, at 329.

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the RPF has taken only 3, leaving the other 2 to independent candidates, thus violating its own Declaration.[1153] But was this a pure act of magnanimity? According to Article 21 of the Arusha Protocol on Power Sharing, in the event of the cabinet failing to decide by consensus, two-thirds of the members of government can take decisions. This suggests that the RPF did not need ten members of government to control the power: its eight portfolios among a total of 21 ministers allowed it to exercise a blockage with a minority of one third plus one. This was sufficient for the RPF to govern alone mostly since, as seen, the President of the Republic has sovereign power to decide when the government is incapable to take a decision. In other words, the real constitutional exercise of power is held by the RPF and it is not necessary to occupy the entire government to do so.

Other important modifications pertain to the legislative power. According to the RPF Declaration, the RPF would take over the seats allocated by the Arusha Peace Accord to political parties excluded from power sharing. This provision was modified by the *Protocole d'Accord* of 24 November 1994, which provided for the distribution of those seats to all political parties represented in parliament. However, the RPF Declaration imposed an important correction regarding the representation of the army in the National Assembly, whence the *Protocole d'Accord* allocated 6 seats to the army.[1154] There now occurred another maneuvre that assured the RPF and its allies a parliamentary majority that they would not have had otherwise. The situation reached was such that on the RPF side, the RPF had 13 seats, the PL, 13 seats, 3 small parties[1155], 6 seats, and the army 6 seats, which makes a total of 38 seats. On the side of other parties, the MDR attained 13 seats, the PSD, 13 seats, and the PDC 6 seats, which totals 32 seats. Clearly, the six military members of parliament tipped the scales in favour of the RPF and its allies. As a matter of fact, the military officers would not vote a motion of censure against the Defense Minister, their hierarchic superior in the Executive under which the army falls. This contradiction underlies the principle of incompatibility between the duties of a Member of Parliament and other functions detailed in Article 72 of the law on the National Assembly.[1156] This law, which is still in force, provides that once a person in the categories enumerated in Article 72 is elected Member of Parliament, s/he has to resign from that category

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[1153] One minister who had to resign and go into exile told the author that what is called 'independent candidate' is "just an RPF supporter".

[1154] Protocole d'Accord, CLR, Vol. I, 1995, p. 7.

[1155] It is not certain that the RPF can rely totally on those parties; without military seats, the RPF would have remained a minority.

[1156] According to article 72, the mandate of a member of parliament is incompatible with the functions of: Republic President, judge, prosecutor, civil servant, agent of a public or private institution, member of the armed forces, and agent of communal administration. *Loi no. 18/1983 of 27 August 1983, J.O., 1983, p. 501; Codes et Lois du Rwanda, Vol. I, 2nd ed., 1995,p. 37.*

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before being sworn in, in order to serve the National Assembly fully and independently. As the armed forces are classified under the functions in question, the appointment of military officers provides some evidence that the rule of law continues merely to be on the books in Rwanda. Besides, the maneuvres of the National Assembly were accompanied by rude remarks uttered by Vice-President *Kagame* on Members of Parliament who criticised the RPF and the behaviour of army officers. On several occasions, he accused Parliament of acting as an opposition party, and working to subvert the government.[1157]

For example, in an interview in June 1995, he said that there would be no tolerance of any undisciplined action among Members of Parliament operating under parliamentary privilege. He said the Speaker of the National Assembly should make the party disciplinary rules part of the standing orders, under which Members of Parliament could be punished for any breach within the precincts of Parliament.[1158]

Regarding the duration of the transitional period, Article 5 of the RPF Declaration provides for 5 years instead of the 22 months stipulated in the Arusha Peace Accord. At the time of writing this dissertation, the five years have been extended by another four years.[1159]

Following abuses committed by the RPA on the Hutu population and irregularities committed by the RPF in almost exclusively appointing Tutsis to the judiciary and territorial administration,[1160] there was a misunderstanding within the cabinet. The meeting of 25 August is worth commenting on because it caused political incidents that illustrate the unpreparedness of Rwandans for establishing a viable State.

As the Vice-President and Minister of Defense was implicated and could not support his questioning, he quit the meeting and the security problems on the agenda remained unsolved as no one else could chair the meeting or convene another one. On 28 August the Prime Minister resigned at 12 o'clock.[1161] His resignation was announced in a press release by the Minister of Information, *rapporteur* of the government, at 1 o'clock.[1162] This resignation was followed later in the afternoon by

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[1157]Nkuliyingoma, J.B., Speech during the funeral of the late Seth Sendashonga, May 1998.

[1158]Sendashonga, 12 Nov. 1997.

[1159] AFP, 19 July 1999.

[1160] Sendashonga, 12 Nov. 1997.

[1161] Faustin Twagiramungu, Interviewed by Canal Afrique, 25 July 1999.

[1162] Radio Rwanda, news bulletin, 25 July 1995.

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that of the Minister of the Interior.[1163] Then President *Bizimungu* convened the National Assembly at 3 o'clock. He 'asked' the parliament to vote a motion of censure against the Prime Minister, which was done without debate.[1164] On 29 August, the President dismissed the Ministers of Information, Justice, Interior - despite his resignation the preceding day[1165] - and Transport and Communications.[1166] On 31 August, the President nominated a new Prime Minister, *Pierre-Célestin Rwigema* and twenty Ministers among whom 5 were new while 3 changed portfolios.[1167]

Serious unconstitutional procedures can be pointed out with regard to this episode: since the Prime Minister had resigned, the vacancy would have had to be certified by the Supreme Court upon the request of the government.[1168] Whatever the case, the dismissal of a resigning Prime Minister is a legal non-sense. Even in the instance of a dismissal being imposed on the incumbent, Article 79 of the Arusha Protocol on Power Sharing would have been violated as it does not provide for a motion of censure, but rather for the implication of the responsibility of a Minister or the government by Parliament, and not by the President.[1169] What is more, a motion of censure is admissible only after questioning of the person involved and in the presence of one third of the members of parliament.[1170] In the particular case, there was no questioning and the motion was presented by the President. Article 79 also provides that 'members of parliament vote by secret ballot', but this vote was taken by the raising hands.

Furthermore, according to the Arusha Protocol on Power Sharing, the vote on a motion of censure against the Prime Minister entails his resignation and that of the entire cabinet.[1171] In this case, the whole cabinet was supposed to resign after the vote of 28 August and it would not have been necessary to dismiss the four Ministers. It was another example of legal non-sense.

The nomination of the new Prime Minister also violated the constitutional order. According to Article 53 of the Arusha Protocol on Power Sharing, the political party to which the dismissed or resigning

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[1163] Sendashonga, 12 Nov. 1997.

[1164] Apparently the members of parliament voted on the President's pressure. 'Only 6 courageous members did not vote'. Interview with an M.P who, after the meeting, went into exile.

[1165] All Hutus

[1166] This Minister was probably 'sacrificed' to avoid the impression that the measures concerned only Hutus.

[1167] For the composition of the cabinet, see Le Carnet, Sept., 1995, p. 138-9.

[1168] Arusha Protocol on Power Sharing, art. 53, Codes et Lois du Rwanda, vol. I., 2nd ed., 1995, p. 14.

[1169] Codes et Lois du Rwanda, vol. I., 2nd ed., 1995, p. 16-17.

[1170] Ibid.

[1171] Ibid.

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Prime Minister belongs presents one candidate who first has to be accepted by the other political parties in government and then be presented to the President of the Republic for formal nomination. However, the MDR, party of the Prime Minister, was asked to present four candidates and the other political parties had no opportunity to indicate acceptance or rejection of the candidate, *Célestin Rwigema*, who was number four on the list nominated by the President.[1172]

Within less than four days the Rwandan State had been confronted with a number of unconstitutional issues in favour of the RPF. One has every right to conclude that Rwanda does not have a fundamental law worthy of the name. Indeed, there is no provision for amendment of the so-called *Loi Fondamentale*. One could wonder whether the RPF could unilaterally modify it by amending its Declaration of 17 July 1994 to which the 24 November 1994 Protocol subscribed. It would have been easy and transparent to combine the four instruments that form the *Loi Fondamentale* in a new Constitution, be it provisional, and to let the National Assembly act as a derived constituent.

Overall, the new government did not present any hope of national unity. Statistics show that out of eighteen ministries there were only three or four minor adjustments and five complete changes.[1173] But these changes and the way they were carried out were highly indicative of a new order of things in the political structure of post-genocide Rwanda. The removal of Colonel *Alexis Kanyarengwe* from the Ministry of the Interior was a major signal in itself. At the same time, his case is perhaps the most illustrative of the denial of freedom of speech within the RPF. A Hutu soldier from the *Ruhengeri* area, Colonel *Kanyarengwe* was a close associate of General *Habyarimana* and played a role in his take-over in 1973. In 1980 he was involved in an attempted *coup d'état*, aimed at the overthrow of his friend, and had to flee to Tanzania. After ten years in exile he joined the RPF in 1990 and became its nominal Secretary General. When the *PRF* came into power in 1994 he was appointed Vice Prime Minister, a largely honorary position, and when his Hutu colleague *Seth Sendashonga* was removed from the Ministry of the Interior in August 1995, he took his place. A former Hutu power devotee in his youth, he had become the willing tool of the RPF's Tutsi power structure during the war years. As a native of the *Ruhengeri* prefecture he was considered to be a natural "protector" of the people of his area.[1174] In fact, he had managed to recruit some Hutu soldiers into the Tutsi-dominated RPA. His political situation therefore became very awkward in early 1997 when many

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[1172] Mouvement Démocratique Républicain, *Position du Parti* MDR *sur les grands Problèmes actuels du Rwanda,* Kigali: MDR, November 1994.

[1173] Prunier, Rwanda: The Social, Political and Economic Situation, 14.

[1174] Ibid.

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people of his area were being killed by the same RPA. By February the situation had worsened to the point where many members of his direct family had also been killed. When, on 3 March 1997, more than 150 people were killed in the communes of *Kigombe*, *Mukingo* and *Nyakinama*, in *Ruhengeri*, in reprisal for the murders of two RPA soldiers, he felt he had to act. He organised a meeting in the north where he supported the *Ruhengeri* Prefect *Ignace Karuhije* who had denounced the violence and asked for the arrest of Major *Rugambwa*, the commander of Battalion 199 responsible for the killings. *Rugambwa* was detained briefly, but was later freed and it was Prefect *Karuhije* who was first arrested and later dismissed from his position. On 27 March, *Kanyarengwe* was forced to resign his post of Minister of the Interior, and his position of Vice Prime Minister was abolished. He was later dismissed from his position as nominal head of the RPF and replaced by Major General *Paul Kagame*, Vice-President of the Republic and Minister of Defence, the second in command being President *Pasteur Bizimungu*.[1175]

The new Minister of the Interior, *Abdul Karim Harerimana*, a particularly lacklustre person, was a political lightweight. Of uncertain parentage, considered "a Hutu by defect", he was a Muslim brought up in Tanzania who did not belong to any political party. He had no independent political constituency and was "a pliable tool in the hands of the RPF power structure". After the elimination of *Seth Sendashonga* and *Faustin Twagiramungu* in August 1995,[1176] *Kanyarengwe* was the last Hutu in government who could be said to have a truly independent political constituency. "His removal was a symbol of the total elimination of the Hutu community as a political partner in the so-called coalition government".[1177]

Another case was that of *Marc Rugenera*, Minister of Finance, who was demoted to the newly-created Ministry of Tourism, Mines and Crafts. But since there was no tourism and there were no mines, the Minister's job was to administer a handful of arts and crafts cooperatives.[1178] In a lesser way than *Kanyarengwe*, *Rugenera* was also an autonomous Hutu politician. He was one of the last surviving leaders of the PSD, most of whose leaders, all liberal Hutus, were killed during the genocide. *Rugenera* had his own constituency in the south and was an able administrator. In his position as Minister of Finance, he had often questioned the disbursement of large unauthorised sums of money to the military, and the RPA leadership was looking for an opportunity to remove

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[1175]The Central African Newsletter, No. 15, April 28-May 28, 1998, p. 17.

[1176]See Matata, J., Communiqué No. 5, 1996.

[1177]Prunier, Rwanda: The Social, Political and Economic Situation, at 4.

[1178]Ibid.

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him.[1179]

Rugenera was replaced by *Jean Birara*, former Head of the Central Bank under President *Habyarimana* and Minister for Planning. *Birara* was a technocrat, a very able administrator, but not a politician. When he was asked by the Belgian Senate Commission of Inquiry on Rwanda to go to *Brussels* to testify, he initially accepted but later withdrew his acceptance when the Rwandan government frowned upon his giving testimony. He was unlikely to cause many problems in his new position.

Then there is the curious case of *Patrick Mazimpaka*. Contrary to the two preceding ministers he is a Tutsi. But he spent all his years of exile in Canada, which means that, unlike the "Ugandans", the "Zaïrians" or the "Burundians" he had no basic area of influence. Although a founding member of RPF, he also happened to be considered a moderate. He was Minister of Rehabilitation and Social Solidarity, but his Ministry was abolished on 28 March. This was a somewhat surprising move in the light of the return of more than a million refugees within a few days in November 1996, a development which did seem to call for both "rehabilitation" and "social solidarity".[1180] *Patrick Mazimpaka* himself was made Minister in the President's Office, a high-sounding title for a very ambiguous position. Not that the President did not need a man of confidence near him. President *Pasteur Bizimungu*, a Hutu member of RPF without any personal following of his own, is extremely isolated and under intense personal pressure. His children having been bullied at school by Tutsi children,[1181] he has had to remove them from school and keep them at home, with private tutors.[1182] *Prunier* has remarked that he is discreetly sniggered at by even his closest Tutsi aides and has at times reacted with physical violence (spitting, slapping), which has led to rumours of "mental imbalance", but he has a guardian angel in the person of Colonel *Frank Mugambage*, a well-connected member of the "Ugandan" group. A month after his nomination to this apparently duplicate position, *Patrick Mazimpaka*, however, still did not have an office at the Presidency and still had not managed to have an interview with his old RPF comrade *Mugambage,* to define the relationship

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[1179]Ibid.

[1180]The RPA had attacked refugee camps sheltering Rwandan Hutu in Eastern Zaïre, allegedly to break the control of armed elements training to attack Rwanda. However, they indiscriminately killed hundreds of thousands, many of them women and children, in this operation and many others were forced to return *en masse* to Rwanda. *See Human Rights Watch/Africa Fédération Internationale des Ligues des Droits de l'Homme, Vol. 9, No. 5 (A), October 1997, p.10; Agence France Presse, Wednesday 9 September 1998.*

[1181]They were called "children of the Protector" (a local brand of condoms), an allusion to the fact that the Hutu President is used by the Tutsi regime as a public relations device.

[1182]Prunier, Rwanda: The Social, Political and Economic Situation, at 4.

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between their respective posts. The change looked more like sidetracking than like promotion.[1183]

The Rehabilitation and Social Solidarity job was demoted to the level of a *Secrétariat d'Etat* that was given to a new person *Béatrice Sebatware-Panda*. This seemed like an odd choice since she is the daughter of a well-known Hutu *génocidaire* who is on the wanted list of the International Tribunal in *Arusha*. With such a 'criminal' father, it is probable that *Ms Sebatware-Panda* will also prove to be rather compliant mostly since she has not been given means to work with the Hutu returnees.[1184]

The other changes - appointment of *Bonaventure Niyibizi* to the Ministry of Trade and Dr *Vincent Biruta* to the Ministry of Health - have brought two capable young Tutsis who have expertise in their fields but no political experience whatsoever, and who consider themselves to be "technical ministers" into these positions.[1185]

But the manner in which these changes were carried out, was at least as significant as the changes themselves. "The regime acted within 48 hours to complete the reshuffle, consulting nobody since political parties were suspended for an indefinite period, and making no mention of the *Arusha* Agreement or of the Government Convention of 24 November 1994 or of any other constitutional or para-constitutional provisions. The reshuffle was an arbitrary act, with ministers dismissed or chosen secretly."[1186] The absence of any reference to political parties confirmed their actual demise, not that they mattered very much in themselves. As seen, their marginalization had been obvious since the RPF seized power and not much of them remained. But the fact that they were so unceremoniously buried signalled an end to any pretence of a democratic RPF regime in Rwanda. As the next section will indicate, the simultaneousness political promotion of the Army and the disappearance of the political parties has actually turned Rwanda into a *de facto* collegial military dictatorship.

The question of the relationship between the RPF and the former opposition was at the center of the whole political process. Foreign Minister *Jean-Marie Vianney Ndagijimana*, in an interview given to a French magazine after his defection[1187], listed the fact that as a 'party' minister he was constantly by-

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[1183] Ibid.

[1184] By the time of printing this dissertation, Béatrice is seeking asylum in Belgium.

[1185] Ibid.

[1186] Ibid.

[1187] *Jeune Afrique* (24-30 November 1994). Ndagijimana was a determinedly careerist diplomat. A mild MRND supporter, who had been posted as ambassador to Paris, he switched sides soon after the death of President Habyarimana. He managed to impose himself on Prime Minister Twagiramungu as future Foreign Minister all the more easily since the only other logical candidate was Anastase Gasana (who replaced Ndagijimana on 24 November 1994), a political rival of the Premier. Ndagijimana then joined the Premier's party, but was soon disappointed by his experience as a born-again

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passed by more powerfully connected RPF colleagues as one of his complaints against the new regime. The impression was that an RPF minister was twice the standing the minister his MDR or PSD colleague was. This state of affairs eventually led to the publication by the MDR on 25 November of a working paper devoted to the constructive criticism of the political evolution in Rwanda since 19 July.[1188] This is worth examining in detail because it presents a discussion of all the various problems faced by the new government.

The first MDR complaint concerned the fact that the *Loi Fondamentale* had been violated because the transitional period, which was supposed to last twenty-two months, had been unilaterally extended by the RPF to five years. This was of course both true and a calculation. For the MDR, which was almost sure to win any election and dreamed of power acquired in this fashion, with all the necessary trappings of democracy opening a royal road to the World Bank vaults, five years was a very frustrating delay. Worse, it could be the prelude to a definitive confiscation of power by the RPF. For if there were a few Hutus in the Front, this was mainly due to the war, when men like *Pasteur Bizimungu or Seth Sendashonga* had made their choice, thinking that armed struggle was the only way to remove 'the *Habyarimana* dictatorship'.[1189] But now, after victory, ethnic politics were bound to reassert themselves, whether one wanted them to do so or not. Some Tutsis[1190] on the *Kagame* political line hoped for a Rwandan society where they could practice the Ugandan type of 'no-party democracy'.[1191] But this of course was an ambiguous recipe which, on one hand, was sincerely trying to avoid the pitfalls of ethnicity and which, on the other hand, could also become a convenient disguise for Tutsi domination. The difference was that there were thirty-two main tribes in Uganda and not two, and that *Museveni's* balancing act was somehow possible only because he played a masterly and complex game among all of them. The dual logic of Rwandan politics allowed no such refinements, and non-ethnic politics still belonged in the domain of pious wishes.

MDR minister, and defected while on his way to the UN Assembly in New York, having made sure he had enough government money to cushion his exile. But he is an intelligent man and his criticism of the new Kigali government is far from being unfounded.

[1188] Mouvement Démocratique Républicain, *Position du Parti* MDR *sur les grands Problèmes actuels du Rwanda,* Kigali: MDR, November 1994.

[1189] This objective was often repeated on RPF *Radio Muhabura* during the war.

[1190] Some sources cite Frank Mugambage and Patrick Mazimpaka as "idealistic Tutsi moderates". See for example, Prunier, The Rwanda Crisis, at 210.

[1191] See Nelson Kasfir, 'The Ugandan elections of 1989', p. 247-78, and Apolo Nsibambi, 'Resistance councils and committees: the case of Makerere', p. 276, both in H.B. Hansen and M. Twaddle (eds), *Changing Uganda,* London: James Currey, 1991. Also Gérard Prunier, 'La recherche de la normalisation', p. 131-58, and Per Tidemand, 'Le système des Conseils de Résistance', p. 193-208, both in Prunier, G., and Calas, B., (eds), *L'Ouganda Contemporain,* Paris: Karthala, 1994.

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The RPF could not win elections as a political party because, even with some Hutus in its ranks and with moderate Tutsis at its head, it was going to be perceived as 'Tutsi Power'. This was what President *Buyoya* of Burundi had painfully learned in April 1993 when all his 'goodwill and honesty' failed to save him from defeat at the polls. So the MDR wanted elections for exactly the same reason as the RPF did not want them.

The next five points of the MDR document also had to do with the problems posed by the duality of power between RPF and cabinet:

Firstly, there was a confusion of powers between the executive, the legislative and the judiciary (p. 3). Secondly, the process of integrating the 1,000 former FAR officers and soldiers who had joined the RPA was too slow. And the document added, on page 16: 'We must create a really national army that is an army that will reflect all the components of Rwandan society'. For this read 'We want more Hutu in the RPA', something the Tutsi RPA officers were bound to view with extreme caution.

Thirdly, it is necessary to clarify the juridical status of the RPF (p. 7), an obvious point, but which was akin to asking the protean RPF 'military-front-social-movement-political-party' to become a political party like any other. Or rather unlike any other. It would become the Tutsi political party. With the RPF turned into a party (though it is known as such by the public opinion), how many Tutsis would there be in the MDR, the PSD or even the PL? And how many Hutus would the RPF retain, should the political game be opened at that particular time?

Fourthly, the document underlined the fact that there was no security, no due process of law and that there were many arbitrary detentions in military camps (p. 7), a point which came as a complement to the first above, adding, on page 18: 'To restart agriculture, we must eliminate insecurity which prevents the peasants from cultivating their fields because they cannot be sure that they will still be alive a few days from now'.

And finally, there was a denunciation of the widespread property grabbing by the former refugees coming back from Uganda and Burundi (p. 7 and 22), the implicit criticism being that the RPF turned a blind eye on such acts or even connived with the voracious refugees.

Over the other points raised there was much greater consensus: establishment of some sort of a jurisdiction of exception to judge the perpetrators of the genocide and the creation of an international commission of inquiry in order to counter the idea of the 'double genocide' (p. 16).

This document should be seen as documentary evidence of a number of the main socio-political

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problems existing at this particular time in Rwanda. It should also be analyzed both as a political broadside aimed at the RPF as an over-powerful partner in a so-called coalition government and as a political tract aimed at putting down other coalition rivals such as the PSD by demonstrating to Hutu opinion that even if *Faustin Twagiramungu* was Premier, he was no stooge of the RPF. But the document also had something of a 'holier-than-thou' quality. For example, on the question of arbitrary detentions, the MDR was very vocal about those of the judges *Josephine Mukanyangezi* and *Claude Gatera*[1192], the journalist *Dominique Makeri* and former vice-governor of the National Bank of Rwanda, *Pierre Rwakayigamba*. But it was less vocal about the detention of *Sylvestre Kamali*, a direct political adversary of *Faustin Twagiramungu* within the MDR, who had probably been detained on the Prime Minister's orders.[1193]

3.3.2 More abuses

Not only has the RPF violated the constitutional order regarding the exercise of power but it has also failed to prove different from the Hutu regimes with regard to the protection of human rights.

In one case, where a gendarme was tried for manslaughter, a judge of the *tribunal de première instance, Gratien Ruhorahoza,* deprecated the indiscriminate way in which policemen used firearms on suspects, saying that guns were "carried as if they were meant to frighten the people" and that cases of police firing at people had become prevalent in Rwanda. He said that while the idea was to scare away would-be robbers, the use of firearms against suspects was to be discouraged. He remarked that day in and day out there were abundant reports about suspects being shot dead by police and that in the end the Republic was becoming oppressive because of such incidents.[1194]

The deployment of heavily armed soldiers along the border with Burundi to stop "smuggling of fuel,

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[1192] Although not charged with anything, the detained judges were usually arrested for being 'too soft' on Hutu detainees. Most of the time they simply did their job of releasing from custody prisoners whose files were empty. But the army did not see it that way, and for the soldiers a denunciation is often a presumption of guilt.

[1193] Kamali was a leader of the 'Power' fraction of MDR in 1993-4, but he distanced himself from his fellow 'Power' members and does not seem have supported the genocide. This is why he came back to Kigali of his own free will instead of going to Goma. He was arrested soon afterwards. But one should not forget that before the explosion Twagiramungu had lost control of his party and the 'Power' fraction held the majority. In any case, the problem of detentions was a nightmare because, as one minister said, 'given the intertwining of matrimonial and family relationships, many of us in the government, even the Tutsi, have relations who are guilty of having taken part in the genocide'. *(Patrick Mazimpaka, interviewed by Prunier G., Kigali 17 January 1995. Prunier, G., The Rwanda Crisis, at 333).* Shortly after, two of the Hutu cabinet ministers were discovered concealing relations who were allegedly suspected to have played a major part in the genocide in their houses.

[1194]Lii Rocher, Rwanda: Visit report, 25 January 1996.

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potatoes and other basic commodities", culminated in killings of suspected smugglers.[1195] On November 13, 1995, the security forces were ordered to shoot on sight fleeing "smugglers of petrol" by the commander-in-chief of *Butare* who compared those people to "armed robbers". At least 24 suspected "smugglers" were shot dead between September and October 1996.[1196] The *Centre de Lutte contre l'Impunité et l'Injustice au Rwanda* condemned the killings and described them as no less than *"tueries sans pitié"* (cold-blooded murder).[1197] However, the political and administrative head of *Kigembe* Commune defended the shootings saying that suspected smugglers should be treated as criminals.[1198] What was even worse was that Vice-President Paul *Kagame* also defended the shooting of suspected smugglers as justifiable because of the circumstances under which the officers were operating. He urged Rwandans not to rush to condemn the security forces.[1199] Not surprisingly, no soldier was ever arrested and charged for any of the killings.

The sanctioning and encouragement of these killings by political leaders, including the Vice-President, placed the security forces above the law. Smuggling was not a capital crime, and even if it were, it would not be justifiable to kill unarmed suspects who did not threaten the lives of the security forces. Every suspect is entitled to due process of law consisting of investigation of facts by duly appointed officers, a fair and public hearing within a reasonable time by an independent and impartial court of law, and a judgement pronounced publicly unless this would be against public morals, national security or public order.[1200]

In December 1996, *Obed Rwangasana*, suspected of theft, died at *Ruhengeri* Hospital after 3 days of interrogation at the *Ruhengeri* gendarmerie. He bled profusely from deep wounds on his buttocks (inflicted by the gendarmes) but for 3 days the gendarmerie ignored his wife's pleas to take him to the hospital.[1201]

[1195]Most of the killings of suspected so-called smugglers occurred between 1995 and 1997. For example on Sept 24, 1995. soldiers deployed along the Burundian border in Butare and Gikongoro shot dead 128 people. Id.

[1196]Interview with Major Leonard Nzeyimana, 20 October 1997.

[1197]Centre de Lutte contre l'Impunité et l'Injustice au Rwanda, Press Release, 008/96.

[1198]Id.

[1199]The Minister of the Interior, Seth Sendashonga, in a statement to Parliament on 15 June 1995 admitted that firearms had been issued to police officers who were not qualified to handle them. Interview with Seth Sendashonga, 12 Nov. 1997.

[1200] Constitution, Article 89 and 90; International Covenant on Civil and Political Rights, Articles 9 (3) and 14.

[1201]Lii Rocher, Rwanda: Visit report, 25 January 1996.

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Suspect criminals have been tortured and compelled to confess to crimes.[1202] The most striking fact is that any mention of police cells in Rwanda instantly evoked fear and terror. For many Rwandans police cells were horrifying places that do things no other place can do to a human being. There were seventeen prisons in Rwanda almost all of which were and still are in a terrible state of disrepair and are not fit for human habitation.[1203] Rwandan prisons have arguably become the most crowded, most dangerous, and most inhumane prisons in the world. Hundreds of thousands of people have been held in truck containers, disused factories, old bathrooms, wet or leaking dungeons, or anywhere things can be confined.[1204] The prisons, most of which were built during colonisation, are overwhelmingly over-crowded, lack sufficient manpower and adequate resources. Most of the existing prisons were built between 1928 and 1965 when crime was not a serious problem. For example Kigali prison was built in 1930 for 480 inmates but now takes in over twelve thousand inmates. As a result, the density has been such that at least four inmates occupied every single square metre of floor space in the open courtyards and six were squeezed into every square metre in the poorly maintained and ventilated dormitory buildings that surround the courtyards. These crowded places serve as toilets, sleeping, and living rooms. Pot or plastic containers are used to collect urine and faeces. Once the containers are full, they are carried outside the cells by prisoners under police escort. The containers are then sometimes cleaned and brought back for reuse and the cycle starts over again.[1205] Prisoners have no beds and often have no blankets. They are usually given one poorly cooked meal a day, which is usually inadequate, and which they have to eat in those foul smelling places. The prisoners usually have little or no recreational facilities. Because of the shortage of prison space remand prisoners and convicted prisoners are kept in same cells.[1206] Furthermore, prisoners are not allowed to greet the relatives who bring food to them. There is a row of heavily armed soldiers between the visitors and the prisoners' rows.[1207]

These conditions constitute inhuman and degrading treatment. No human being, no matter how heinous his crime is, deserves to live under such abominable conditions.

[1202] Amnesty International, UA 134/95; *HRFOR*, status report as at 14 May 1996; *Dialogue No. 196, Feb. 1997, p. 44*; *ARDHO, Raport de visite, June 1997*; and *Centre de Lutte Contre l'Injustice et l'Impunité au Rwanda, Note d'information No. CL 08/97/MJ, March 18, 1997.*

[1203] United Nations, GRFOR, E/CN.4/1998/61, 19 Feb. 1998.

[1204] Kabongo, K., Rwandan prisons or the return of servitude, Clarinews, May 23, 1998.

[1205] Account given by a former prisoner who managed to escape, under the pseudonym of *Kabongo*, June 1997.

[1206] Mulaba, A., Rwandan prisons: The genocide of Hutu in Rwanda (unpublished), p. 2.

[1207] Kabongo, Rwandan prisons or the return of servitude, May 23, 1998.

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Well over a thousand people have died in detention. In *Butare* prison, the extraordinary high death toll of 166 prisoners was recorded in 1995.[1208] For example, on March 17, 1995, soldiers at the *Muhima* brigade forced more than sixty persons into a room far too small to accommodate them. During the night they begged to have the door opened because some were dying for lack of oxygen. The guards refused to open the room until the next morning. Then they found twenty-two persons had died of suffocation. Four others were so ill as to require hospitalisation and two of them subsequently died.[1209] Detained persons have been beaten before arriving at prison, either en route or at some intermediate place of detention such as military brigade, communal lockup, or residence occupied by soldiers.[1210] Prisoners have been regularly tortured. Thousands have lost limbs, developed skin diseases, or caught recurrent or terminal illnesses.[1211]

To the common methods of torture used during the Hutu regimes, the post-genocide regime has added: stripping suspects naked while they were being interviewed, and suspending suspects from iron bars and then whipping them.[1212]

Even hospitalised prisoners were tortured. For example *Bimenyimana*, detained in *Gitarama* prison was hospitalised in *Kabgayi* hospital as a result of torture resulting in contusions and bleeding. On 15 February 1995, two gendarmes and one soldier visited him "for interrogation" and took him to an isolated room of the hospital. The following day he presented "serious post-traumatic epistaxis, dyspnoea and dysphagia caused by strangulation manoeuvres" of which marks were visible on the neck. On 17 February he was no longer able to swallow anything and he died at 14 hours.[1213] Five months before, several hundred soldiers who were left at *Kabutare* hospital "disappeared" soon after the town fell to the Rwandan Patriotic Army *(*RPA*)* at the start of July 1994. Former government soldiers had been severely wounded or disabled in battle and were left behind by their retreating colleagues. Amnesty International found in the hospital one decomposed body of a soldier whose head had been smashed by RPA soldiers before death.[1214] Alarming statistics on mortality rates of

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[1208]*HRW/Africa* and *FIDH*, April 1995, Vol. 7, No. 1, p. 4.

[1209]Id., at 5.

[1210]Ibid.

[1211]Kabongo, Rwandan prisons or the return of servitude, May 23, 1998.

[1212] Karemano, P., *'The Rwandan tragedy: What people should also know', 1997, p. 49.*

[1213]Kabgayi Hospital, *Examen médical de Mr. Bimenyimana*, 17 February, 1995.

[1214]AI INDEX: AFR 47/16/94, April-August 1994.

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hospitalised prisoners as a result of torture had been made available by *Médecins Sans Frontières (MSF)* who concluded that out of 129 hospitalised prisoners, 53.8% died.[1215]

Political prisoners were subjected to torture. In *Ministère Public v Muhirwa*,[1216] the plaintiff, who was detained by the public prosecutor under public security regulations for political reasons, claimed damages for assault, intimidation, trespass to the person and false imprisonment by the secret police. He was moved to an illegal non-gazetted detention centre, where he was imprisoned in a filthy cell of minute proportions with little or no light or ventilation, forced to enter and remain in the nude, threatened with violence, subjected to torture and particularly to electric shock, interrogated in a dark room with bright lights directed into his eyes, punched and slapped, had his life threatened, was given little and insufficient water and food, and forced to remain awake for long periods of time. The court found that allegations of torture, inhuman and degrading treatment had been proved. The judge condemned the treatment meted out to *Muhirwa* by the secret police and awarded him exemplary damages. On the day which followed this ruling, Justice *Ruhorahoza,* who had chaired the bench during the proceedings, was abducted by the torturers and *Muhirwa* died in prison a month later.[1217]

Some authorities condemned police brutality against suspects and prisoners.[1218] For example, in April 1995, *Seth Sendashonga*, Minister of Home Affairs accused prison warders and secret police of perpetrating "Nazi-type atrocities of torture" against inmates and detainees. He asserted that one popular method of torture was packing iron objects into suspects' genitals. He wondered how the gruesome tortures were being committed under the "noses of leaders who claimed to be guided by the rule of law." He said tortures were being committed especially against inmates whose cases were of a political nature. He added that government, army and party leaders should not be using institutions created to serve the people for torturing innocent citizens. He alleged that tortures were administered because of "biased and unfortunate reports" and that in most cases the police did not have sufficient evidence against detainees. He also deplored the interference of army soldiers in

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[1215]See letter dated 19 February 1995 addressed to the Director of *Gitarama* prison by *Médecins Sans Frontières quoted in Centre de Lutte Contre l'Injustice et l'Impunité au Rwanda, 008/97.*

[1216] RP 470/95/Kig., 1995

[1217]*CLCIR, CL 01/96, p. 2.*

[1218] The wide-spread and pervasive nature of torture and inhuman treatment of prisoners and suspects drew criticism from international human rights organisations such as Amnesty International (*Amnesty International, AI INDEX: AFR 47/05/95, 14/9/1995*) and Human Rights Watch (*Human Rights Watch Africa, The Aftermath of Genocide in Rwanda, September 1994*).

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police matters.[1219]

Faustin Twagiramungu, former Prime Minister, alleged that Rwanda was building "torture chambers". He told the National Assembly of some gruesome tortures, in which inmates and detainees were stripped naked, had pins pushed into their genitals and were left in agonising pain.[1220] But his remarks had no positive effect.

In addition to the explanation for the prevalence of torture and police brutality in Chapter two, the excessive politicisation and ethnicisation of the gendarmerie and the office of public prosecution to which the *police judiciaire* belongs bred lack of discipline and lack of professionalism. The police has had, since colonial times, operated in an oppressive government in which the civil and political rights of the individual have been subordinated to public security and public order. The gendarmerie and *police judiciaire* have been used as an instrument to suppress dissent against the government. Thus, the police were loyal not to the Constitution but to the political leaders of the day. Political leaders, including the President, often defended the police against accusations of brutality.[1221]

Moreover, the prevalence of torture and inhuman and degrading treatment can also be explained by the interference of the army in tasks falling within the competence of the police. Since colonisation the army has been interfering in the maintenance of law and order. During the Hutu regimes, army soldiers were responsible for arrest, torture and killing of people believed to be "enemies of the Republic" whereas during the Tutsi regime, RPA soldiers were responsible for the same acts on persons suspected to be "infiltrators' and/or to have participated in the genocide. Some officers have apparently viewed their domain as extending beyond their normal action into the judicial sphere.[1222]

The so-called "operation clean-up" in 1994 and 1995 also worked against the right to liberty. Armed police, aided by heavily armed soldiers and helicopter gun-ships, usually sealed off large sections of a town or a residential area, preventing anyone from leaving or entering the target area for several hours at a time. They then proceeded to search, without search warrants or probable cause, all

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[1219]Statement by Seth Sendashonga, Council of Ministers, 1995; Sendashonga, 12 Nov. 1997.

[1220]*Faustin Twagiramungu*, Conference, Brussels, 14 November 1996.

[1221]For instance, during the *Habyarimana* era in May 1988, the gendarmerie violently broke up a demonstration by University of Rwanda students. The government-controlled press published a picture which clearly showed gendarmes brutally kicking students. This was not just an aberration. On numerous occasions, General *Kagame* sent heavily armed soldiers, paramilitary police and regular gendarmes to the so-called "red zones". The security forces would surround the area late at night when people were asleep and then, at the crack of dawn, force the people at gunpoint to assemble in a central area and open fire. *Nsengiyaremye*, The unknown tragedy, *at 105.*

[1222]*Human Rights Watch/Africa and Fédération Internationale des Ligues des Droits de l'Homme, April 1995, Vol. 7, No. 1, p. 7.*

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houses, business premises and people, who were often stripped naked. These searches were intended to flush out "infiltrators", criminals, and to recover stolen property.[1223] However, hundreds of Hutus were arrested without arrest warrants and detained without accusation or trial. Many of them were evicted from their properties. A number of them died in custody and the properties were taken and illegally occupied by officers of the Rwandan Patriotic Army.[1224] Such indiscriminate searches and mass detentions of people were a serious violation of the right to liberty, as well as other rights and freedoms such as the freedom of movement, freedom from deprivation of property, and the right to privacy of home and other property.

In March 1998, about 167,000 people were in detention in prisons all over the country and and in secret places, many of them for alleged participation in the 1994 genocide. 58,450 (35%) were under PVA, 61,790 (37%) without any title and 25,050 (15%) under warrant for provisional arrest. This means that 145,290 (87%) inmates were in detention before trial and without order for preventive detention.[1225] The most striking fact is that the National Assembly has enacted a retroactive law extending the period of provisional detention to December 31, 1999 for this category of suspect arrested before December 31, 1997.[1226] This suggests that all the suspects arrested before December 31, 1999 may remain in prison for more than five years without a warrant for provisional arrest or order for preventive detention.[1227]

Contrary to emergency regulations studied in section 2.6, the police declared illegal curfews on many occasions.[1228] Thousands of people were arrested, detained and fined for breaking these illegal curfews. Some of the curfews were often applied only to Hutus under the pretext that they were a danger to the '*sécurité de l'Etat*'. During a curfew declared by the Ministry of Defence, particularly in

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[1223]For example in Jan 21, 1995, heavily armed security forces, supported by helicopter gun-ships mounted a massive clean-up operation in Kigembe, in which hundreds of aliens, mostly from Burundi were rounded up. The security forces raided homes and business premises and seized large quantities of goods and money. In Ruhengeri, armed units sealed off all public places such as hotels and guesthouses at dawn before conducting searches of all rooms and occupants. Troops were ordered to arrest any "aliens" not able to produce valid immigration papers, and also any one found with large sums of money. All roads leading out of the city were sealed off and motorists were only allowed through after their vehicles had been thoroughly searched. (La Voix des Sans Voix, No. 2, March 1995). Such operations have been carried out on a regular basis.

[1224] Centre de Lutte Contre l'Injustice et l'Impunité au Rwanda, 008/97.

[1225]Force de Résistance pour la Démocratie, 10 April 1998.

[1226]*Agence France Presse, 9 January 1998.* A great number of the suspects were arrested in 1994 through 1995.

[1227] For the impact of this state of affairs on human rights regime since 1994, see RDR, Press Release, No. 18, 1999.

[1228]Example: the curfew imposed on October 7, 1996, in Ruhengeri was declared by the gendarmerie without consultation with administrative authorities. Radio Rwanda, news at 19 hours.

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Gikongoro[1229] after Tutsis had seized power in 1994, RPA soldiers opened fire to about 8,000 Hutus who had taken refuge in *Kibeho*.[1230] During the consecutive nights of 20 and 21 April 1995, RPA soldiers opened fire on the crowd of refugees and also fired on them several times during the day on 22 and 23 April, until 5 p.m. They threw grenades at women and children. According to Human Rights Watch, the soldiers hurriedly buried some of the dead during nights of 22 and 23 April and early in the morning on the 23rd, and threw the rest into latrines. They prevented the blue helmets and human rights observers from seeing the bodies in certain parts of the camp. In the few places where access was not denied, UN officials estimated the deaths at 4,050.[1231] The Centre de Lutte Contre l'Injustice et l'Impunité au Rwanda counted 8,000 dead.[1232] Furthermore, between 24 and 27 October 1997, villagers fleeing violence during a curfew declared in *Ruhengeri* took refuge in the *Nyakinama* caves. The Rwandan army and security forces bombed the caves, killing thousands of people.

A fake attack similar to the one in Kigali on 1 October 1990 occurred in 1997 when a pattern of killings of detainees by RPF security forces emerged. The most serious incident occurred in May when a guard opened the communal detention centre at *Bugarama* in *Cyangugu* to kill the inmates. Rwandan authorities argued that the prison had been attacked by armed groups and that the security forces intervened to "maintain public order".[1233] At least 46 detainees were shot by guards who also threw grenades through cell windows. However, United Nations' human rights observers and local human rights organisations reported that the detention centre building showed no sign of an attack from outside.

With regard to press freedom, the government has operated a sort of "ethnic cleansing" of the State media. Anxious to avoid the emergence of more "hate media", the ruling RPF has called for journalists to be responsible and maintains strict control of information. Newspapers in the country include two publications controlled by the Rwandan Information Office (ORINFOR), *La Nouvelle Relève* and *Invaho Nshya*, and a range of weeklies that appear with varying regularity, including *Intego* and *Le Partisan*, which have been both victims of official harassment.[1234] The government has

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[1229] Radio Rwanda, News bulletin, 27/11/1994

[1230] Matata, Violations flagrantes des droits de la personne humaine, 1996.

[1231] Human Rights Watch/Africa and Fédération Internationale des Droits de l'Homme, quoted in Dialogue, No. 183, May-June 1995, p. 36-37.

[1232] Matata, Report 1997.

[1233] Amnesty International, Report, 1997.

[1234] The Editor-in-chief of *Le Partisan* has been forced into exile and live in USA since April 1999.

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no immediate plans to privatize broadcasting. Three applications to start private radio stations have been on ice since 1994. They are Human Rights Radio, put forward by the *Collectif des Associations des Droits de l'Homme (CLADHO)*, which groups various human rights organizations, and the French-language Belgian branch of Amnesty International, *Agatashya*, submitted by the Swiss charity *Hirondelle*, and *Radio Unité*, submitted by the diocese of *Kabgayi*.[1235]

Journalists have been reported missing, have been arbitrarily arrested, threatened and harassed. *Manasse Mugabo*, head of the *Kinyarwanda*-language section of the United Nations' Radio (MINUAR), left his home to go to Uganda on 19 August 1995. He never arrived, and neither his wife nor his employers have received any indication that he is alive since. He was officially on leave from 15 to 31 August. On 2 September the MINUAR peacekeeping force contacted the journalist's wife, who confirmed that was missing. MINUAR officially informed the government on 10 September and human rights organizations on 12 September. The security services claim to have opened an inquiry but no findings have been published. On 4 October, annoyed by the government dragging its feet, MINUAR publicly announced that the journalist had gone missing. A source close to *Mugabo* recalled that he had received direct threats from officers of the RPA.[1236]

Radio Rwanda journalist *Dominique Makeli* has been held at *Rilima* prison since 18 September 1994. Some witnesses say he was arrested for declaring on the radio that his and others' houses were occupied by RPA militia.[1237] One government Minister accused a senior ORINFOR official of having *Makeli* imprisoned unjustly. Despite promises from the justice and defence ministries, representatives of *Reporters Sans Frontières* were refused permission to visit him on six consecutive occasions between September 1994 and May 1996.[1238]

Gédéon Mushimiyimana, a journalist with Rwandan national television, was arrested in Kigali on 17 March 1995 and accused of belonging to the Coalition for the Defence of the Republic, a Hutu extremist movement implicated in the 1994 genocide. An RPA soldier, a police officer and a police inspector went to arrest *Joseph Ruyenzi* at his office on 30 March. The journalist, a Hutu, had been in charge of

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[1235] Reporters Sans Frontières, 1 Feb. 1998.

[1236] Id.

[1237] Caporal Maniragaba, 14 March 1995; Agnes Mujawamariya, 12 May 1996; André Karuhije, 26 March 1998.

[1238] Reporters Sans Frontières, 1 Feb. 1998.

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Kinyarwanda-language programmes on *Radio Rwanda* since January 1995. Observers believe he was a victim of a plot to stop him working for the radio station.[1239]

In June, the staff of the privately owned weekly *Intego* entered a period of continual harassment. *Amiel Nkuliza*, editor who also runs the weekly *Le Partisan*, was briefly arrested and questioned on 10 June about a report on tension in the country. On 29 July a court ordered the seizure of *Intego*'s 15th issue at the printing works, shortly before it was due to be distributed. The next day managing editor *Isaie Niyoyita* was summoned by the court for interrogation. Meanwhile *Appolos Hakizimana*, another *Intego* journalist, was arrested and held at *Muhima* police station. *Nkuliza* was arrested again on 6 August by three men wearing civilian clothes and one soldier. He was held for a week. The arrest came the day after the most recent issue of *Intego* and the 37th issue of *Le Partisan* appeared. He was questioned about various reports that had appeared in *Intego* and a soldier warned him that he might be killed if he wrote any more reports considered subversive by the government.[1240]

Boniface Murutampunzi, a journalist with Radio Rwanda and a contributor to international media such as *Africa No. 1, Deutsche Welle and Radio France Internationale (RFI)*, took refuge abroad on 24 June 1996. He said there was a "denigration and intimidation" campaign against him, and pointed to an article in *La Nouvelle Relève* headlined "Unpatriotic press correspondents". He was accused of being an "agent" for an "anti-patriotic organization" - Amnesty International - because he had passed on information about atrocities committed by the government. He fled to escape what he described as "certain arrest".[1241]

RFI journalist *Ghislaine Dupont* was assaulted in her hotel room on the evening of her arrival in Kigali on 5 March 1995. Two men armed with knives got into the room, accused her of being an enemy of the Rwandan people and threatened to kill her, then stole her money and made off. Despite the journalist's cries for help, the two men were not prevented from leaving the *Hôtel des Diplomates*. The police force second-in-command, *Jean Damascène Sekamana*, was at the hotel when the assault occurred, but only took action 25 minutes later. *Dupont* complained to the police, who refused to give her a copy of her statement.[1242]

[1239] Caporal Maniragaba, 14 March 1995; Agnes Mujawamariya, 12 May 1996; André Karuhije, 26 March 1998; Reporters Sans Frontières, 1 Feb. 1998.

[1240] Reporters Sans Frontières, 1 Feb. 1998.

[1241] Murutampunzi, B., 10 Oct. 1997.

[1242] RFI, 6 May 1995, quoted in Karemano, *The Rwandan tragedy, at* 43.

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These data are sufficient to demonstrate that the abuses have occurred so often during the post-genocide government and in such similar ways that they must have been directed by officers holding highly responsible positions. The fact that these abuses were known to and tolerated by the highest levels of command of the RPF forces is evidence of the scant regard of Rwanda authorities for human rights.

3.4 Military officers in power

The RPF as a whole is composed of ethnic Tutsis from Uganda, Burundi, Zaïre, Rwanda (survivors of genocide), Kenya, Tanzania, Europe and the United States. Most of them contributed to the war against *Habyarimana* administration, in giving funds to the RPF, or sending their sons and daughters to the battlefield in the ranks of the RPA. But those members from Uganda, a distinct political faction, effectively seized the leadership. It is this group of "Ugandans" known as the *akazu* which effectively came to form the government. The "non-Ugandans", perceived externally to be part of the ruling structure, are isolated and alienated from the "Ugandans". Those who created *akazu* are from the same refugee camps named *Nyakivara* and *Nshungerezi* in Uganda, and originally came from *Gahini* in the *Kibungo* prefecture of Rwanda.[1243]

The RPF power structure in Rwanda is dual. There is a government, of course, but this government carries out policies, it does not define them. To give an example of how this works: late in 1996 the then Minister of Finance, *Marc Rugenera*, was asked point blank by RPA colonel to give him $US 500,000 "to take care of urgent matters". When asked to state in greater detail what the money was for, he said it was to pay his men. The Minister then asked him for a detailed list of personnel for whom this money was earmarked and what their salaries were. Whereupon the Colonel exploded and told *Rugenera* that he would "hear about it". Later, Vice President and Minister of Defence Major General *Paul Kagame* phoned *Rugenera* and told him to pay the $US 500,000 to the Colonel "for the good of the country". *Rugenera* did not push the matter any further and arranged for payment of the money.[1244] This illustrates fairly well the relationship between the army and the civilian government.

Practically all the key men in the power structure are "Ugandans" who either are current or former RPA officers. Nepotism and regionalism in the military forces is well remarked when it comes to promotion: almost only "Ugandans" are promoted and observers have seen this as a reason for the closure of the institute of military sciences, the *Ecole Supérieure Militaire (ESM)*. According to

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[1243] For details about the *akazu*, see Mugabe, J.P., 'Mbwirire Kagame muruhame rwa bose', *Rwandanet, 10 June 1999.*

[1244] Ibid.

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Mugabe, the closure was to prevent general applications for officer candidacy so that officers could be selected solely from the *akazu* families and not from other regions.[1245] "Most high-ranking officers are uneducated and from Uganda while many of the non-commissioned officers are educated high school and college graduates and from other countries than Uganda. Open dissent is rare, however, from "non-Ugandans" because of the fear of the Department of Military Intelligence (DMI), itself not surprisingly, led by officers from Uganda".[1246] Indeed, in the Security organs it is sometimes possible to find an innocuous Hutu officer in the official Number one position. But the real power is in the hands of Number two. The name and practice of the DMI was directly borrowed from the corresponding Ugandan service. Major-General *Kagame* had been second in command of DMI in Uganda before the 1 October 1990 attack. The name of the service has never been translated into French and it was the almost exclusive preserve of former Ugandan Army officers. It keeps files on all political personnel and has targeted as "accomplices of the infiltrators" all the various Hutu politicians who have been marginalized during the RPF regime.[1247] Keeping tabs on the others has helped to keep them in line.

During the RPF regime, there were many colonels in civilian positions, such as *Emmanuel Ndahiro*, who was a personal aide to Major-General *Kagame* and his ears and eyes when he accompanied cabinet Ministers on foreign trips, *Ephraim Kabayija* who was a special adviser on the question of the returnees from Zaïre, or the already mentioned *Frank Mugambage* who shadowed President *Bizimungu*. *Claude Dusaidi*, General *Kagame*'s diplomatic adviser, was also a "Ugandan".[1248]

The same group of "Ugandan" colonels, such as Colonel *Fred Ibingira* who is head of the Kigali Military Region, held key positions in the army.[1249] The "Ugandan colonels", whether in the army or outside it, were the real new elite of the country. They relied on a second tier of non military "Ugandans" who were their friends, relatives and associates back in Uganda and tried, as far as possible, to monopolise all the good jobs in the monetary sector of the economy. In fact, many had relatives who had stayed in Uganda, perhaps as a kind of "insurance" in case things go really bad in Rwanda, and many were shuttling back and forth. Among the "shuttlers" some ended up deciding

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[1245] Mugabe, *Mbwirire Kagame kukarubanda, p. 3.*

[1246] Ibid.

[1247] Ibid.

[1248] Ibid.

[1249] Colonel Ibingira was the local commanding officer in April 1995 when the Kibeho Internally Displaced Persons' camp came under attack from the RPA, causing about 8,000 casualties. He was tried in late 1996, given a six-month suspended sentence for "negligence" and walked out of the courtroom a free man to take up his command in the Kigali Military Region within days.

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that it was better for them to stay in Uganda, thus widening the network.[1250]

3.5 The return to the *ancien modèle*

In the contest for ascendancy between State leaders and strongmen, State leaders invariably resort to the tactic of regime modification.[1251] "The Big Shuffle" consists of a rapid and unpredictable turnover of personnel in strategic positions within the regime and bureaucracy, through the power of appointment available to State leaders, so as to prevent individuals from developing autonomous sets of interests which differ from those of State leaders. Non-merit appointment, such as those based on personal loyalty to State leaders, co-optation of potential rivals, and the so-called "ethnic bargain" aim to achieve the same objective.[1252] The final tactic consists of "dirty tricks", ranging from illegal imprisonment of opponents through to deportation and the elimination of individuals by death squads. Extreme tactics like these, where State leaders subvert the rules they need for effective State building, set in motion a process of de-institutionalisation and thus undermine the very project for which they are deployed.[1253]

When the RPF launched the war, the establishment of a State of law and a democratic system which were the main claims was just a pretext and the RPF took advantage of the genocide to set up a self-proclaimed government and related institutions. Observers have indicated that the suppression of political activities, the decisive place of the army in the government, the parliament, justice and civil service and the neutralisation of communal, prefectural and national institutions by powerful military secret services proceed from the establishment of a hegemonic, absolute and oppressive regime.[1254]

[1250]Ibid.

[1251] Migdal, Strong Societies and Weak States, at 217-226. Migdal does not use the state/regime distinction but merely draws a line between State leaders and State bureaus and agencies. It is clear from his analysis, however, that some of these agencies and bureaus are products of specific regime types. According to Fishman, a regime refers to a component within the State, consisting of values, norms, rules and procedures that deal with the ordering of power within the different organizational sites of the State. Fishman, R., "Rethinking State and Regime: Southern Europe's Transition to Democracy". *World Politics*, (1990, April) 42, 422-440.

[1252] The Lebanese National Pact of 1943 is selected as a prime example of an "ethnic bargain". While this label hardly does justice to the complexity of this pact and other such constitutional arrangements, Migdal's awareness of these kinds of regime types links his framework to the body of literature which focuses on the appropriate constitutional rules for democracy in divided societies.

[1253] du Toit, P., Civil Society, Democracy and State-building in South Africa, Research Report No. 1, Stellenbosch: Centre for International and Comparative Politics (Stellenbosch University), 1993, p. 5.

[1254]Otherwise, members of opposition parties, or simply Hutus, have been harassed in many ways. Some have been fired from jobs, evicted from their houses and prevented from using public facilities. Others, such as *Sylvestre Kamali* have been arbitrarily arrested for allegedly posing a "threat to the State's security". *Amnesty International report, April*

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Moreover, the ethnicisation of institutions is a sign of a regime based on exclusion and ethnic discrimination instead of inclusion and equality before the law. In a country where nearly 90% of the population are Hutus and nearly 10% are Tutsis, out of 21 government ministers 13 are Tutsis; the army is overwhelmingly Tutsi; all the councillors at State House are Tutsis; out of 17 principal private secretaries 14 are Tutsis; out of 5 departmental heads in the office of the Prime Minister 3 are Tutsis; out of 18 director generals 16 are Tutsis; out of 60 general managers of parastatals 58 are Tutsis; out of 10 chairpersons and vice-chairpersons of parliamentary commissions 8 are Tutsis; in the local government, out of 11 prefects 8 are Tutsis and all the 143 burgomasters are Tutsis.[1255] As one commentator said, "these integrated Hutus are just there to show the donor community that the power is not mono-ethnic".[1256]

3.6 Abuse of legislative power: The Organic Law No. 8/96

On 30 November 1996, the government gazette, *Journal Officiel de la République Rwandaise*, published the first list of 1946 suspects of genocide and crimes against humanity, in execution of the Organic Law No. 8/96 of 30 August 1996 regulating the prosecution and punishment of the acts of genocide and crimes against humanity perpetrated in Rwanda since 1990. The analysis of both instruments reveals a deliberate violation of certain human rights by the RPF Tutsi regime.

3.6.1 The wording of the organic law

Article 9 of the Organic Law No. 8/96 of 30 August 1996 provides that,

> As investigations proceed, a list of persons suspected or accused of acts placing them within Category one shall be prepared and updated on a continuing basis by the Prosecutor General of the Supreme Court. This list shall be published three months after this Organic Law is published in the Official Gazette, and shall be republished periodically thereafter as it is updated.

This provision suggests that progressive results of a judicial inquiry will be published and thus, persons whose names appear on the list should be those "suspected or accused". In other words,

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1997. See also Rwanda pour tous, Mémorandum sur la crise rwandaise, Brussels, 24 October 1995, p. 4; Prunier, G., Rwanda: The Social, Political and Economic Situation, at 11.

[1255]Rwanda pour tous, Memorandum sur la crise rwandaise, at 5.

[1256]Kamanda, B., "The RPF Reveals its Image". *Rwandafor*, 25 June 1998. However, nepotism has also divided RPF members and the armed forces. For example, most RPF ambassadors are from the same region of Kibungo prefecture. Examples: Rudasingwa (Washington DC); Kayinamura (UN); Rugema (Israel); Nsenga (London); Karenzi (South Africa); Mukanyange (Tanzania); Karenzi, T. (Burundi). *International Strategic Studies Association, Substantial Movement Toward New Rwanda War, Aug. 9, 1999.*

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there should be a complaint and public action against them. The examination of the individual dossier should allow the Prosecutor General to conclude that serious clues of evidence of guilt exist so as to rank the suspects in Category one. According to Article 2 this category comprises only:

> Persons whose criminal acts or whose acts of criminal participation place them among the planners, organisers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity; persons who acted in positions of authority at the national, prefectural, communal, sector or cell level, or in a political party, the army, religious organizations or in a militia and who perpetrated or fostered such crimes; notorious murderers who by virtue of the zeal or excessive malice with which they committed atrocities, distinguished themselves in their areas of residence or where they passed; and persons who committed acts of sexual torture.

These persons allegedly responsible for the Rwandan tragedy are likely to be sentenced to death and to the total and perpetual loss of civil rights.[1257] Such an accusation is so serious that it should be based on serious and confirmed clues.

Moreover, the published list raises many questions: was the publication in the Official Gazette the right way to deal with genocide suspects? Was the publication within the jurisdiction of the *Procureur Général* who is under the hierarchical authority of the Minister of Justice? Was not there a confusion between the competence of the "General Attorney" or the "Deputy Minister of Justice" in the United States system and those of the Rwandan *Procureur General*? Are the persons mentioned in the list presumed innocent or already condemned by the already done categorisation? Did the published list correspond to legal requirements for prosecution? What are the predictable consequences on the persons whose names appear on the list for the State and the prosecutor who drew the list in case some of the suspects sue them for libel? What attitude should the international justice take vis-à-vis the named persons? Does the list bind the person who drew it or prosecutors dealing with the charges in question?

3.6.2 Legislation on publication in the official gazette

The *Ordonnance Législative No. R/60 (1962)*[1258] which provides for the publication of formal official decisions determines the decisions of which publication in the Official Gazette is imperative. These are, according to Article 1, the acts of parliament, presidential orders which have been passed in the Council of Ministers, ministerial orders upon presidential delegation, administrative decisions taken by a competent authority for the whole population, as well as for individuals in certain administrative

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[1257] Id., art. 14 & 17.

[1258] *Ordonnance Législative* No. R/60 of 28 June 1962, J.O., 1962, p. 305.

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cases.[1259]

After the preamble, the publication reads *"Ordonnons que"*. This expression can be assimilated to an *"ordonnance"* (order). However, an order made by the high ranking prosecutor in the *Ministère Public* which is under the authority of the Government and the Minister of Justice[1260] does not find any place in the hierarchy of norms in force in Rwanda.

In the preamble, it is provided that "*Vu la loi organique No. 8/96 du 30 Août 1996, spécialement en son article 9, ensemble l'ordonnance législative No. R/60 du 28 Juin 1962, en son article 1er alinéa 2*".

This suggests that the list published in the Official Gazette is one of the decisions taken for execution of the Article 9 of Organic Law No. 8/96. According to the 1991 Constitution, under Article 16, 1° of the protocol relating to power sharing, the government is the principal institution in charge of the execution of laws. The President is also vested with the same authority by Article 14, 4°, which emphasises that the President must be explicitly required to execute a given law. One would, therefore, wonder how a public prosecutor could enact decisions in execution of laws whereas the President of the Republic cannot do it, except when he is explicitly required to do so.

The *Code d'Organisation et de Compétence Judiciaires* which determines, inter alia, the mission of the Ministère Public provides that,

> *(...) exerce l'action publique et requiert l'application de la loi; il poursuit l'exécution des arrêts et jugements rendus en matière repressive pour ce qui concerne les dispositions intéressant l'ordre public. Il a la surveillance des officiers de police judiciaire et des officiers publics.*[1261]
>
> *En matière répressive, le Ministère Public recherche les infractions aux lois et règlements; il reçoit les plaintes et les dénonciations, fait les actes d'instruction et saisit les tribunaux.*[1262]

It follows that the Code does not provide for the enactment of decisions in execution of laws. In their investigative mission, the *Officiers du Ministère Public* can only issue warrants: warrant for arrest, summons, search warrant etc.[1263] and not enact orders. An order is not an act of investigation.

[1259]Example: appointment of a Prefect, a burgomaster, a director general; promotion, dismissal or suspension of a civil servant etc.

[1260]See *Code d'Organisation et de Compétence Judiciaires, art. 63.*

[1261]Id., art. 57.

[1262]Id., art. 58, par. 2.

[1263]See *Code de Procédure Pénale,* art. 25 & 32.

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Therefore, it is exceptional that an order of such a magnitude could be enacted by an *Officier du Ministère Public*. The reference in the preamble to the *Ordonnance Législative No. R/60*, particularly to its Article 1, paragraph 2, shows clearly that the measure enacted ranks among administrative acts enacted under the supervision and control of the Government. As far as the prosecutor is concerned, the decision was published in the Official Gazette in violation of certain essential rules and principles for a judicial investigation worthy of the name.

3.6.3 Rules and principles violated

The atrocities that Rwanda has endured since October 1, 1990 require adequate, appropriate and stringent solutions. However, whatever measures are taken should respect the rule of presumption of innocence and the principle of secret of investigation.

The presumption of innocence is provided for in Article 11, 1º of the Universal Declaration of Human Rights and in Article 14, paragraph 2 of the International Covenant on Civil and Political Rights. As already seen, Rwanda is party to these instruments and the presumption of innocence is guaranteed in Article 12, paragraph 3 of the Constitution, as well as in Article 16 of the *Code de Procédure Pénale* which puts the burden of proof on the *Ministère Public* or the private party associating in action with the public prosecutor for compensation. Article 16 reads:

> *La charge de la preuve incombe au Ministère Public ou, en cas de constitution de partie civile ou de citation directe, à la victime ou à ses ayants cause. Le prévenu est présumé innocent tant que sa culpabilité n'est pas établie par une condamnation devenue définitive. Aussi longtemps que sa culpabilité n'est pas établie, le prévenu n'est pas tenu de fournir la preuve de son innocence. Toutefois, lorsqu'un fait est prouvé, il appartient au prévenu d'établir toutes exceptions, fin de non-recevoir, cause de justification ou d'excuses, toute preuve contraire.*

On the list, certain persons are identified under names and/or surnames without any mention of charge, commune of origin or place of commission of the crime. This suggests that the process was at the stage of preliminary investigation and, thus, suspicion. Otherwise, as some have asserted, this would look like an invitation to the suspects to present their guilty plea.[1264] But this assertion is not right because the publication of a name in the Official Gazette under the first category of criminals legally constitutes an obstacle for the accession to extenuating excuses for a plea of guilt provided for in Article 9 of the Organic Law. This provision, omitting the irrelevant part, reads,:

> (...) a person who confesses and pleads guilty, and whose name was not published on the list of

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[1264]See *Raporo y'inama y'abaperezida, 3 Nyakanga 1996, p. 34 - 36.*

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> Category one, shall not be placed in Category one if the confession is complete and accurate. If his confession should place him in Category one, he shall be placed in Category two.

It adds:

> Persons who shall have confessed their criminal acts before the list of names of Category one is published shall be placed in Category one if the acts they have committed place them there.

This provision shows clearly that the publication of names or surnames in the Official Gazette automatically makes the persons in question guilty and this is blatant violation of the constitutional right of presumption of innocence to which the suspect is entitled until a final court decision.

The principle of secret of investigation forms one body with the presumption of innocence. They contribute together to the protection of human rights and fundamental freedoms. As long as a person is not condemned by a final decision of a court of law, it is formally prohibited to divulge elements of investigation contained in his dossier. In the civil law system, the procedure is unilateral, written and secret during the pre-trial phase. The *Ministère Public,* which, in Rwanda, plays the role of the examining magistrate, has the obligation to conduct the investigation in order to charge or discharge the suspect.[1265] It is an institution in charge of the protection of human rights and fundamental freedoms in a democratic regime.

Article 9 of the Organic Law No. 8/96 reads *"au fur et à mesure que les enquêtes progressent .... . "* This suggests that the publication in the Official Gazette concerns persons whose dockets are under investigation. It also suggests that there are sufficient charges for these persons to rank in the first category of criminals. Although publication is a legal obligation, it is in violation of the principle of secrecy of instruction, mostly since the author of the decision is himself exceptionally in command of public prosecution. This exceptional capacity is conferred upon him by Article 22, paragraph 3 of the Organic Law:

> *Le Procureur Général près la Cour Suprême assure la supervision et la direction générale des parquets de la République et des parquet généraux pour les matières relevant de la compétence des chambres spéciales.*

This provision is a derogation from Article 59 of the *Code d'Organisation et de Compétence Judiciaires* which limits the capacity of the Prosecutor General to the cases to be judged by the

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[1265]Kint, R., Introduction au droit écrit et à la recherche juridique, Butare: UNR, 1983, p. 48.

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Supreme Court only .[1266]

3.6.4 Relevance of the facts communicated to the public

3.6.4.1 Identification of suspects

As already shown, the provision that *"au fur et à mesure que les enquêtes progressent ..."* suggests that dockets are already opened against persons of whom data that identify them are given in the Official Gazette under their registration numbers. These persons are accused of actions ranking them in the first category. However, they are identified in various ways on the basis of sundry data, some of which do not allow unequivocal and certain identification of persons in question.

Article 62 of the *Code de Procédure Pénale* determines the required data for the identification of the suspect: name, surname, sex, residence, summary of the offence, place and date of commission and provision of the penal code which defines and punishes the offence. These data allow the *Officier du Ministère Public* to personalise the offence and to avoid judicial errors. Any judicial complaint must contain necessary data for the identification of the perpetrators of acts brought under attack and which, if necessary, can allow the judge to request extradition to Rwanda of persons who are outside the Rwandan territory.[1267]

It should be pointed out that Rwandan law does not require a family name[1268] and the same names and surnames for people from different families are a common occurrence in Rwanda, which is likely to lead to confusion. On the list in the Official Gazette, most of the data provided comprise the name and surname, ex-occupation or political party, and for some suspects, the commune, parish, sector or cell of residence.

Many suspects are identified by name and surname only, without any other reference. This is the case for persons appearing under numbers 208, 209, 210, 218, 219, 220, 222, 232, 233, 236, 237, 244, 248, 270, 275, 313, 333, 334, 337, 361, 1687, 1906, 1907, 1908, 1909, 1910, 1911, 1915, 1916, 1917, 1918, 1919, 1920, and 1921.[1269] Others are identified either by their name or surname,

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[1266]According to article 59, *Le procureur Général près la Cour de Cassation [Cour Suprême] n'exerce pas l'action publique, sauf lorsqu'il intente une action dont le jugement est attribué à la Cour de Cassation [Cour Suprême].*

[1267]In *MP v Kagenza*, for example, the court acquitted the defendant because the prosecutor had failed to identify his sex and place of residence. See Kibungo, RPM 105/3.

[1268]The only requirement is just a surname (any) within 15 days following the birth. The first name is optional. See *Loi No. 42/1988 of 27 October 1988, art. 59, J.O., 1989, p. 9.; Codes et Lois du Rwanda, Vol. I, p. 189.*

[1269]Ntampaka, C., 'La Justice rwandaise à l'épreuve du droit, *in: Dialogue, No. 195, p. 21.*

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for example, numbers 163, 164, 185, 186, 190, 194, 200, 202, 226, 267, 282, 283, 1461, 1476, 1510, 1528, 1604, ...[1270] The frequency of Rwandans bearing the same names and/or surnames would render legal proceedings against inadequately-indentified people almost impossible.

Other persons are falsely identified by positions they did not occupy or titles they have never born. For example, number 64 is identified as former president of the MRND. However, the MRND has had two successive presidents: *Juvénal Habyarimana* and *Matthieu Ngirumpatse*[1271] and none of them appear under No. 64. Number 88 is identified as *"ex-officier des FAR (Major), ancien Secrétaire Général du Ministère de la Justice, partisan de la* CDR*"*. However, it has become clear that there was a confusion with another person who was neither a military officer nor a secretary general.[1272]

Number 141 is labelled *"Président du gouvernement* MRND-CDR*"*. But such a government did not exist during the period in question and has never existed in the Rwandan history.

Other persons appear under two different numbers identified by different data. This is the case for persons under numbers 32 and 252; 119 and 193; 894 and 1893.

The lack of uniformity, the diversity of data of identification and the omission of basic data for the identification of suspects reflects the precipitation and lack of seriousness with which the lists were established and published and, thus, the precariousness of the human rights of the suspects.

3.6.4.2 The legal description of facts

The Organic Law No. 8/96 provides for the prosecution of acts that constitute the crime of genocide, war crimes and crimes against humanity perpetrated in Rwanda from October 1, 1990. These crimes are defined in international conventions[1273] and the Nuremberg principles adopted by the General Assembly of the United Nations in 1946 and which constitutes customary international law.[1274] These

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[1270]Ibid.

[1271]See Manifeste et Statut du MRND, at 13; Rapport du Gongrès National du MRND, 4 March 1991.

[1272]Testimony from Kamatali, Justice Ministry, quoted in Ntampaka, La Justice rwandaise à l'épreuve du droit, at 21.

[1273]Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, U.N., *Treaty Series, vol. 78, p. 277; the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949; Convention on the non-application of statutory limitations to war crimes and crimes against humanity, 26 November 1968, U.N., Treaty Series, vol. 754, p 73.*

[1274] Reference can also be made to the following reports by Americas Watch Committee, Violations of the Laws of War by Both Sides in Nicaragua 1981 – 1985 (1985); Violations of the Laws of War by Both Sides in Nicaragua – 1985, First Supplement (June 1985); Human Rights in Nicaragua 1985 – 1986 (1986). Common Art. 3 reads as follows: 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each

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are the only possible qualifications referred to by the Organic Law.

Apart from the name, surname and ex-occupation, the list mentions, as elements of identification, expressions such as CDR, MRND, *actionnaire de* RTLM, *chef suprême des interahamwe, membre des interahamwe, membre du* MDR, *membre du* MDR-Power, *chef du* MDR-Power, PL-Power, *interahamwe, membre de l'escadron de la mort, etc.*[1275] No precise indication concerning the legal qualification of facts is mentioned beside the published name. This raises the issue of knowing whether these expressions constitute the charges against the persons in question.

As seen, membership of political parties was authorised by the law on political parties of 18 June 1991.[1276] Making membership of a political party or any other registered organisation a charge means that the membership *per se* is considered an offence, which would place the law on the registration of the organisation itself in question. The author of the list should rather have detailed punishable acts allegedly perpetrated under cover of their organisation or in its framework by the suspects. The accusation would, thus, concern the act itself, whereas the organisation would constitute an aggravation of the offence if, as required by the penal code[1277], it was proved that it was created to facilitate the crime, which is conspiracy punishable under Articles 281 to 283 of the penal code.

It follows that the facts brought under attack are neither precise, nor defined in time and space. They are indicated by vague and non-precise terms that do not come near to legal definitions of the denounced crimes. They are not imputed to indubitably identifiable individuals, which opens the door to arbitrariness.

3.6.4.3 Prosecution of dead suspects?

Article 1 of the Convention on the non-applicability of statutory limitations to war crimes and crimes

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Party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons: *(a)* violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; *(b)* taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment, *(d)* the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. (...).

[1275]Gakwaya, J., 'Condamnation avant le jugement?' *in: Dialogue, No. 195, January 1997, p. 27.*

[1276]J.O., 1991, p. 728; Codes et Lois du Rwanda, vol. 1, p. 47.

[1277]See *Code Pénal*, art. 281 - 283.

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against humanity establishes an important rule of imprescriptibility of war crimes and crimes against humanity including genocide, and Article 37 of the Organic Law No. 8/96 provides that "prosecutions and penalties for offences constituting the crime of genocide or crimes against humanity are not subject to a limitation period". This suggests that the passing of time from the perpetration of the offence or the pronouncement of the final sentence does not have any extinctive influence respectively on the prosecution and the execution of the sentence. However, according to Article 100 of the penal code, the death of the suspect stops prosecution. During the discussions on Law No. 8/96, a number of members of parliament had no knowledge of this principle. For example, according to the *travaux préparatoires,* the members of Parliament found that the principle of categorisation should not concern only persons in prison, but all guilty persons ... alive or dead.[1278] Nevertheless, the bill that was passed did not abrogate Article 100 of the penal code, and Article 39 of the bill provided that

> ... all laws, including the penal code, the code of criminal procedure and the code of judicial organisation and competence, shall apply to proceedings ...

But the published list contains persons deceased before the genocide, victims of the genocide or who died in massacres during and after the genocide. For example, persons numbered 37, 128, 300 and 784 died during the genocide.[1279] Number 43, judge in the *Cour de Cassation*, was a victim of the genocide on 7 April 1994.[1280] Those listed under numbers 32, 67, 68, 84, 117, 130, 145, 252 and 921 died between April and July 1994[1281] whereas those under numbers 321, 733 and 1712 died after July 1994.[1282] It is not clear, therefore, how Rwandan courts could prosecute the deceased.

This rather goes against the tradition of the Rwandan society with regard to the deceased, towards whom the Rwandan society has legendary respect. This respect requires every member of the society to bow before the deceased and extends beyond burial and even the nothingness, with a cult[1283] frequently developing in honour of the deceased. The publication of the names of deceased persons in the Official Gazette deeply distressed and afflicted the relatives likely to testify for

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[1278]The travaux préparatoires read: "(...) Abadepite basangaga principe ya catégorisation itagendera kubafunze gusa, ahubwo ireba abakoze ibyaha bose (...) baba bazima cyangwa barapfuye. *Raporo y'inama y'abaperezida yo kuwa 21 Kamena 1996, p. 9.*

[1279]Ntampaka, La Justice rwandaise à l'épreuve du droit, at 23.

[1280]Ibid.

[1281]Gakwaya, Condamnation avant le jugement?, at 35; Ntampaka, La Justice rwandaise à l'épreuve du droit, at 23.

[1282]Ntampaka, La Justice rwandaise à l'épreuve du droit, at 23.

[1283]This cult is called *"guterekera"*. The deceased is considered as a respectable and omnipotent being of whom relatives can ask favours relating to rain, children, etc. Ntampaka, C., Introduction au droit coutumier, Butare: UNR, 1983.

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them.[1284]

It follows from the foregoing discussion that the Organic Law contains lacunae. Entrusting the *Procureur Général* with publishing the list of persons allegedly of the first category while investigations aiming at establishing their guilt are still under way is a violation of the constitutional right of presumption of innocence. It should be understood that the author does not deny the usefulness of knowing who has been accused and of what to help with their arrest, but what is considered here is that the system that was used will not bring peace and justice to a country where responsibility for the atrocities in Rwanda is only put on the Hutus by Tutsis, in a one-party Tutsi-based State where Tutsis simultaneously are victims, prosecutors and judges. Despite the genocide, Hutu people know that they have also been victims of atrocities perpetrated by Tutsi soldiers. The author believes that this Organic Law was mostly due to the lack of representative government and the failure of the State to equip its apparatus with human resources from both ethnic groups. It was enacted, not essentially as a deterrent to the culture of impunity, but as a stratagem of maintaining and strengthening the Tutsi hegemony and, at the same time, as a way of covering up Tutsi perpetrators of crimes against humanity probably now in government and in the RPA. In practice, it is seen by Hutus as a "ratification" of the elimination of "educated, physically fit, and mostly male Hutu people".[1285]

Besides this, the Organic Law undermines the principle of secrecy of investigation during the inquisitorial phase, inasmuch as the publication is entrusted to a magistrate under whose authority and supervision the matter is being investigated.

This was a serious violation of the constitutional principle of presumption of innocence. A number of persons have to prove their innocence and public opinion, mostly of the Tutsi population who do not know exactly who killed their relatives, holds them guilty. The proof of evidence is not easy to rely on, mostly when a person's name appears amongst persons of Category one that is published in the Official Gazette. This list suggests that these are persons who should be put to death[1286] and nowhere in the Organic Law is there any evidence that the Prosecutor General would make corrections in the same Official Gazette should a person be able to prove his innocence and be

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[1284]Karemano, C., 'Controverses autour de la Loi sur le crime de génocide et les procès des auteurs présumés' *in: Dialogue, No. 195, January 1997, p 37.*

[1285] See Letter to the Secretary General of the Organization of the United Nations, signed by The Rwandan Community in Zambia, 10/5/1998. Other letters of this kind have been addressed to the OAU (12/3/1997 by Rwandans living in France); all Western Governments (Id., and living in Belgium: 15/8/1997). See also Matata, 1996 and 1997.

[1286] Some of them are already dead, in jail or after unfair trial. See Amnesty International report, April 1997.

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acquitted.

Furthermore, the inaccuracy of the identification of suspects, coupled with the absence of charges and the listing of persons deceased before the genocide, contributes, not only to make trite serious crimes committed in Rwanda and to strike a severe blow to the memory of victims and their families, but also to cast discredit on the *Procureur Général,* if not on the whole *Ministère Public.*[1287]

In practice, this law has been seen by a number of Rwandans as a "ratification" of the elimination of "educated, physically fit, and mostly male Hutu people.[1288] In fact, the finger of suspicion has been pointed at all Hutu people and the way for mass arrests has been cleared. The RPF government has been arresting people at a rate of up to 2,000 a week. Arrests have been carried out mainly by RPA soldiers on the basis of verbal statements by one or two accusers. All Hutus, whoever and wherever they are, inside or outside Rwanda, feel insecure. The terrible conditions in Rwandan prisons have already been described. By June 1995, Rwanda had around 45,000 prisoners awaiting trial, crowded into prisons designed to hold 4,500. On 26 April 1995, 28 prisoners died of suffocation in a jail in the commune of *Rusatira* in *Butare*. According to a *Médecins sans Frontières* report, one prison, *Gitarama*, which was built to hold 400 prisoners, held over 7,000 by May 1995. Between September 1994 and May 1995, 902 prisoners had died 'as direct result of inhumane living conditions due to the lack of space'.[1289] According to Human Rights Watch, by October 1997, about 120,000 Hutu were held under "inhumane conditions, crammed into prisons, irregular places of detention and communal jails meant to house a fraction of that number. In the early part of the year, prisoners in several central prisons received no or very little food for up to ten days, supposedly because of lack of firewood for cooking".[1290] At the end of 1998, over 130,000 Hutus, including children, were detained in Rwandan jails[1291] and the Minister of Justice had announced in November that during only two weeks, 40 detainees at *Rilima* had died of "a strange disease".[1292]

Only about 15% of the detained had documented files[1293] and, under the new "Genocide law", these accused have no right to challenge their prolonged detention without charge in court.[1294] The few

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[1287]Gakwaya, Condamnation avant le jugement?, at 36.

[1288] See ICTR, especially note 1296 and accompanying text.

[1289]'Health status of the inmates of Gitarama Prison, Rwanda', June 1995.

[1290]Human Rights Watch, Report, 1998.

[1291]Amnesty International, Report, 1998.

[1292]Reuters, Friday, 20 November 1998.

[1293] Matata, 1996.

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trials that have taken place have been held before minority Tutsi judges who have received four months' training.[1295] There have been almost no lawyers and case documents have only been provided the day before the trial. Most trials have lasted a few hours, have been based on documentary evidence, and the death penalty has been the general result. The trials, broadcast on the radio, have been held in an atmosphere of hysteria. These legal lynchings have been praised by the United Nations Commission for Human Rights, which has stressed the progress made in Rwanda in the fight against impunity.[1296] Amnesty International is one of the few international organizations to have criticized the trials in its April 8 report "Unfair Trials: Justice Denied".[1297]

Parallel to this punishment reigns a terrible impunity. In Eastern Zaïre, a few hundred kilometers away, hundreds of thousands of Hutu refugees have been massacred by the Ugandan and Rwandan armies, not to mention the executions of the local populations by the same armies. The systematic murder of Catholic leaders such as Archbishop *Christophe Munzihirwa* of *Bukavu* is reminiscent of the tactics of the Salvadorian death squads who murdered the vocal critic and champion of the people, Archbishop *Romero,* in September 1980. *Christophe Munzihirwa* was himself an outspoken critic of the exactions on the Hutu refugees by the Tutsi army.[1298] Meanwhile, no one is accused of the supreme crime of organizing aggressive war in spite of two major invasions in six years: Rwanda in 1990 and Zaïre in 1996.

The adoption of the slogan of the fight against impunity by Rwandan authorities to justify war and aggression is little more than human rights demagogy. Behind the thin veneer of respectability associated with the fight against impunity, can be read once again the history of the last thirty years: impunity is the rule and is reserved for the powerful Tutsis whereas one-sided punishment is the sort reserved for the downtrodden Hutus who stand in the way of the RPF hegemony. The changes that have occurred have nothing in common with the aspirations of Rwandans to democracy and human rights.

One of the conditions for laws Rwandans can trust is to have a democratic, constitutional government, therefore a State committed to the protection of the rights of all citizens without

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[1294] Id.

[1295] In fact, 80% of Rwandan judges and prosecutors died during the massacres from 1990 through the genocide in 1990, were imprisoned or forced into exile. See Donatella Lorch, *Peace in Rwanda is Ugly, Too,* N.Y. Times, Aug. 27, 1995, par. 4, at 3, although she contends, without clear evidence, that the exile was self-imposed.

[1296] Matata, 1996.

[1297] AI Report, 1998.

[1298] See for example his letter to the Governor of Bukavu and to the UNHCR delegate to Bukavu, 23 August 1995.

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discrimination whatsoever, because "it is not merely of some fundamental importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done ... . Nothing is to be done which creates even a suspicion that there has been improper interference with the course of justice".[1299]

3.7 The judiciary in the stranglehold of the executive and the army

A limitation on judicial power is that the judiciary still depends on the non-law-abiding executive to carry out its decisions or put its orders into effect, or simply get its job done. The coercive forces of the State are controlled by the executive who may at any time order the gendarmerie and *police judiciaire* and the prison authorities not to execute any decrees of the court.

In September 1994, Judge *Gratien Ruhorahoza* found that some forty detainees brought before him did not require further preventive detention and he ordered them freed.[1300] They were released, but shortly after most or all of them were re-arrested and sent to the military prison at *Rilima*. The judge disappeared soon after. At one time he was thought to be in prison himself, but he was presumed dead thereafter.[1301]

The following month, a judge gave an order to free a young man because the prosecutor had been unable to locate the persons who had accused him. The detainee was not released. He appealed to the judge-president of the *tribunal*, who confirmed his liberation, but was never freed.[1302]

In early February 1995, the priest of the *Byimana* parish, *Joseph Ndagijimana*, was arrested on charges of having killed several people. Four widows and a widower of his supposed victims said that he was not involved and four others declared that he, rather, had saved their lives. Another person confessed to killing some of *Ndagijimana*'s supposed victims. On the basis of this information, the judge ordered his release but the soldiers who had him in their charge refused to let him go.[1303]

Following the 1994 genocide and subsequent mass arrests, the Minister of Justice created a

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[1299] Lord Hewart in *R v Sussex Justice, Ex parte McCarthy* (1924) 1KB 256 259.

[1300] See RP 6867/84.Cya; RP 1210/87.But; RP 5210/90. Kib.

[1301] Human Rights Watch/Africa & Fédération Internationale des Ligues des droits de l'homme, vol. 7, No. 1, April 1995, p. 7.

[1302] Ibid.

[1303] Ibid.

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"Commission of Liberation" in mid-October 1994 to examine cases of persons who might be eligible for release. Clearly irregular according to Rwandan legal procedure, the commission was apparently meant to protect judges from eventual reprisals. Under this new arrangement, the responsibility for the decision to liberate would rest with the prosecutor, a representative of military intelligence, and a representative of the police. In January 1995, the commission was expanded to include a representative of the secret service. It examined just over one hundred cases and freed fifty-eight of the persons presented. Soon after, others on the commission objected to the participation of the representative of the secret service and the commission ceased all formal meetings. Informal consultations continued between the prosecutor and the two military members. A second commission was created in late March 1995 to examine cases of judges and burgomasters who had been detained. The commission included the Prosecutor-General and representatives of the Ministry of Defence and the secret service.[1304] These commissions had no basis or authority in Rwandan law, and violated provisions that required a judge to rule on cases of preventive detention. By intervening in the process, the commissions undermined the work of the judge, delayed judicial review of the detention and violated Article 9 of the International Covenant on Civil and Political Rights, which states: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power... ." Furthermore, since they were not bound to operate according to the *code de procédure pénale*, the commissions were left free to rule as arbitrarily as they wished, according to personal, political or other criteria. As a result, the judges were all engaged in a mere semblance of judicial activity since they had been led to understand that they were not to liberate anyone. Several judges, speaking at different times and in different places, informed Human Rights Watch that they did not dare liberate anyone because of threats, explicit or implicit, made by military officers.[1305] The situation reached is such that accusation and arrest suffice to establish guilt and that no one in jail could be innocent, no matter how fair the judge would be.

Recently, observers have remarked on what some call an 'ethnic cleansing' of the judiciary, Hutu judges and prosecutors being dismissed and those who were not killed being arbitrarily arrested or threatened and forced into exile.[1306] For example, on the night of February 14, 1998, the judge-president of the Conseil d'Etat and vice-president of the Supreme Court, *Vincent Nsanzabaganwa*, was shot dead in his home in Kigali by RPA soldiers.[1307] He was one of the rare Hutu left in the

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[1304]Id., at 8.

[1305]Ibid.

[1306]Aliro, O., 'Lack of justice in Rwanda', Press Agency, 20 April 1998.

[1307]Ibid.

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higher courts of the country. Another vice-president of the Supreme Court, *Augustin Cyiza*, was dismissed for unspecified reasons on 12 February 1998.[1308]

On 24 April 1998, assistant public prosecutor, *Silas Munyagishali* was publicly executed following an unfair trial in which he was sentenced to death on 22 August 1997 for allegedly having participated in the genocide.[1309] It was only when he attempted to release former central bank employees for lack of evidence for their prolonged detention that he was dismissed forthwith and accused of genocide. During his trial in *Gitarama* in 1997, several defence witnesses were threatened and intimidated and effectively prevented from testifying by RPA soldiers and intelligence agents. His wife *Anonciata* was so terrified by threats to herself that she took refuge with other families and quit her job so that the aggressors would not locate her. She did not testify during the hearing on 3 May although she was the principal witness for the defence, and neither did two other terrified witnesses. The latter had requested that the tribunal consider their written testimonies, but the request was turned down.[1310]

Célestin Kayibanda, prosecutor of *Butare*, was arrested in May 1997, allegedly for taking part in the genocide and murder. Shortly before his arrest, however, he had denounced interference in the judiciary by political and military officials and had received threats from the army commander. *Fidèle Makombe*, prosecutor of *Kibuye*, was beaten by the army commander of that prefecture after protesting against interference by the prefect in the functioning of the judiciary and refusing to order arrests and imprisonment of genocide suspects in the absence of sufficient evidence.[1311]

According to Amnesty International, most of the judges and prosecutors claimed to be victims themselves, almost all of them were RPF members and sympathisers, and most of them did not have adequate qualification and were not jurists.[1312] It would be right to conclude with *Ntampaka* that the positions they occupied in the judiciary were a favour, not a right,[1313]which impacts on the independence of the judiciary.

As regards the legal profession, a law establishing a Bar in Rwanda was published and forty lawyers were sworn in to the newly established bar in 1997. However, almost all of them refused to defend

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[1308]Ibid.

[1309]Amnesty International, AI INDEX: AFR 47/12/98, 22 April 1998.

[1310]Ntampaka, C., 'Rwanda: Une justice qui cherche sa voie' *in: ANB-BIA SUPPLEMENT, No. 337, January 1998, p. 2.*

[1311]Amnesty International, Report, 1997.

[1312]Ibid.

[1313]Ntampaka, Rwanda: une justice qui cherche sa voie, at 4.

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persons accused of genocide. One of the three, who had agreed to do so, *Innocent Murengezi*, "disappeared when he left a court building at the end of January 1998 and has not been located. The two who remained were terrified and did not want to be involved with the defence of genocide suspects".[1314] One commentator said "the genocide issue remains in the hands of the army and some members of the executive".[1315]

3.8 International neglect

International human rights law has its historical antecedents in a number of international legal doctrines and institutions.[1316]The most important of these are humanitarian intervention, State responsibility for injuries to aliens, protection of minorities, the Mandates and Minorities Systems of the League of Nations, and international humanitarian law. These doctrines and institutions were designed to protect different groups of human beings, including, but not limited to, slaves, minorities, certain native populations, foreign nationals, victims of massive violations, and combatants. That law and practice provided the conceptual and institutional underpinnings for the development of contemporary international human rights law differing most significantly from its historical antecedents in that individual human beings today are deemed to have internationally guaranteed rights as individuals and not as nationals of a particular State. There now also exist a growing number of international institutions with jurisdiction to protect individuals against human rights violations committed by states of their own nationality as well as by any other states. Although these remedies are often still quite inadequate or ineffective, the vast body of international human rights law now in existence - as well as the mushrooming of international institutions designed to implement that law - have internationalised the subject of human rights. This development has in turn produced a political climate in which the protection of human rights has become one of the most important items on the agenda of the contemporary international political discourse involving governments,

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[1314]Human Rights Watch, Report, 1998.

[1315] Kamanda, The RPF reveals its image, 25 June 1998. Besides, unlike in other countries, there is still no institute for graduates to train properly in the practice of law. In Zambia, for example, most law school graduates proceed to the Law Practice Institute where they spend one year. In South Africa, depending on the degree or other experience (for instance, a course in practical legal work), a term of articles between one and five years is necessary before one can practice law as an attorney. The South African legal profession is regulated by the Attorneys Act 53 of 1979 (as amended). Graduates from other countries are also provided for in Chapter one of the Act. For admission as an advocate, see Admission of Advocates Act 74 of 1964. See also Recognition of Foreign Legal Qualifications and Practice Act 114 of 1993. Without complying to these qualifications, one cannot practice as an attorney and open a trust account for one's clients. It is a criminal offence if one does endeavour such practice without being admitted as an attorney. See Statutes of the Republic of South Africa, Vol. 27.

[1316] See generally Henkin, L., *The Ages of Rights* 13 (1990).

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inter-governmental organizations, and a vast international network of non-governmental organizations.

As a result, human beings around the world have increasingly been led to believe that states and the international community have an obligation to protect their human rights. To some extent, the international system of human rights protection translates the failure of the State itself to do what it is supposed to do naturally, which is the protection of basic rights and fundamental freedoms of its citizens. This failure is fundamental for Rwanda, as the developments presented in this dissertation have shown that the State has always failed to serve its citizens equally and as of equal status before a coherent system of law. In order to provide for the protection of all citizens, writes *Erasmus*, "also in a State with a heterogeneous population, legal certainty about their rights and status is required. This is probably best achieved by a supreme Constitution based on the idea of the democratic constitutional State and including fundamental rights. Within this framework, provision can be made for individual freedom, tolerance, diversity and freedom of association. Hopefully this will inspire a constitutional patriotism"[1317] which comprises loyalty to that constitutional value system which protects them as citizens, and which the government of the day is bound and restrained to respect. "The equality of all citizens is central to this concept of the State".[1318] The failure of states to perform their primordial duty of protecting human rights and fundamental freedoms is unfortunate and in the case of Rwanda, it seems difficult for international organizations to do for Rwandans what their State has failed to do. But be it as it may, the expectations that the international protection of human rights phenomenon creates makes it politically ever more difficult for growing numbers of states to deny that they have such an obligation which, of course, should facilitate the efforts of those who promote the international protection of human rights. The gains are many, but they remain to be consolidated. Much of the needed law is already on the books. Unfortunately, however, the institutions to enforce the law are still quite weak.[1319] This section deals with the United Nations Organization (UN) whose mandate to act in defense of human rights is a product of compromise. It is clear that the governments which established the UN wanted it to contribute to a higher level of observance of human rights. But it is equally clear that these "founding fathers" wanted to prevent the UN's involvement in human rights from seriously intruding on their national sovereignty. The UN,

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[1317] Although Erasmus applies this idea to the South African State, it can fit for Rwanda, *mutatis mutandis*, due to the ethnic heterogeneity factor underlying its development. *Erasmus, G., "Nationality and Citizenship". South African Citizenship in a Constitutional Context, 1998.*

[1318] Ibid.

[1319] See Buergenthal, T., "The Human Rights Revolution", 23 St. Mary's L.J. 3 (1991).

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in other words, was to be a champion of human rights, but one with strictly limited powers.[1320]

The major purpose of the UN is conveyed in the Charter's provisions empowering the UN to deal with threats to or breaches of international peace and security. Since violations of human rights have been held to be capable of creating situations endangering peace and security, the UN's jurisdiction in these matters implies a mandate to respond to situations involving human rights.[1321]

3.8.1 Background

In fact, the UN was established as a peacekeeping institution in the aftermath of the depression and World War II. The Charter of the UN was written from April to June 1945 when conceptions of peace were being developed as a counterweight to the racist ideas of Nazism practiced in colonial societies. All colonial societies were by definition undemocratic. In the fifty-year existence of the UN, African and other Third World societies have identified colonization as a threat to peace.

There has been considerable debate and discussion within UN agencies as to the real content of peace. One author notes that, "by peace we mean the absence of violence in any given society, both

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[1320] For a review of the background to and development of human rights provisions in the UN Charter, see Ruth B. Russell and Jeanette E. Muther, *A History of the United Nations* Charter (Washington, D.C: The Brookings Institution, 1958). This source notes the unsuccessful effort of some delegations to give the UN a stronger mandate by using such terms as "protect" or "assure" the observance of human rights, rather than "promote and encourage" this observance.

[1321] The measures which the Charter authorizes the Security Council to take, and with which member states are obligated to comply, include complete or partial interruption of economic relations and of (all) means of communication, severance of diplomatic relations, and "such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security". (Articles 41, 42). The authorization for UN human rights action also stems from non-Charter sources. Judicial decision making, for example, is authorized in a number of conventions that grant power to the International Court of Justice. One example is the Genocide Convention, an instrument that also illustrates the limitations placed on this procedure. Thus the Court has no jurisdiction over persons charged with genocide (Article 6) and functions only in cases of disputes between Parties over the interpretation, application, or fulfillment of the Convention, and then only on the request of any of the parties to the dispute. (Article 9). Other functions are provided for the International Covenant on Civil and Political Rights, which authorizes its Committee on Human Rights to review reports submitted by Parties and make general comments on the basis of review reports submitted by Parties and make general comments on the basis of such reviews. The Committee is also empowered to offer good offices and to act as a conciliator when one Party accuses another of non-compliance with the Covenant. The Committee's procedures also include fact-finding. An extra-Charter instrument may also mandate recommendations, which may be general or specific in nature and may be addressed to a UN organ or to states. Finally, it may include provisions for the reception and consideration of petitions from individuals complaining of infringements of their rights, as do both the Convention of the Elimination of All Forms of Racial Discrimination and the Covenant on Civil and Political Rights, with its Optional Protocol. Resolutions provide a second non-Charter source of authority. The Economic and Social Council's Resolution 1503 of 1970, for example, prescribes steps to be taken by the Commission on Human Rights and its subsidiary bodies in reviewing all communications alleging violations which are received by the Secretary-General. The purpose of this review is to determine whether these communications reveal consistent patterns of gross verifiable violations of human rights. Any such situations thus revealed may become the subject of a Commission-authorized investigation, and the Commission is further empowered to make recommendations to ECOSOC on the basis of its study of situations. An investigation may be undertaken only if all available national means of resolving the problem have been used, the consent of the State concerned obtained, and similar consent given to the appointment of the investigating committee. The committee is to strive for a friendly solution before, during, and after its investigation.

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internal and external, direct and indirect. We further mean the nonviolent results of the equality of rights, by which every member of the society, through nonviolent means, participates equally in decisional power which regulates it, and the distribution of resources which sustains it".[1322]

Nearly every year since the United Nations designated 1986 as the International Year of Peace, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) has mounted conferences to refine the concept of peace. UNESCO took the lead from the UN General Assembly by declaring that "every nation and every human being, regardless of race, conscience, language or sex has the inherent right to live in peace". Since 1982, UNESCO has adopted a position that peace is indistinguishable for fundamental human rights and is therefore incompatible with extreme poverty, malnutrition and the refusal of the right of self-determination.

The experience of misguided "humanitarian intervention" in Somalia crippled the UN to the point where it evacuated its personnel from Rwanda at precisely the moment when UN peacekeepers were most needed in April 1994. For two months, the UN equivocated over the issue of deploying peacekeepers after an estimated one million people had been killed. The Secretary General of the Organization of African Unity (OAU), *Salim Ahmed Salim*, was critical of the decision and said:

> The decision to pull out troops from Rwanda is a sign of lack of concern for Africa when the world's body was increasingly involved elsewhere. This is particularly so when account is taken of the fact that the United Nations is increasingly involved in situations affecting peace and security in other regions.[1323]

The deployment of peacekeepers by the UN has been at the behest of the major powers. In reality, the deployment of peacekeepers must go through the long bureaucratic channels of the UN Department of Peacekeeping. When France or the US wants to deploy troops under the banner of the UN, however, they can do so in a matter of days. But the logistical requirements of mobilizing the support and funds for peacekeeping ensure that the UN will be paralyzed when real peacekeepers are needed.[1324] This is the concrete lesson of the genocide in Rwanda.

The attitude of the international community in the face of this problem has so far been absolutely disastrous even with regard to UN observers. On 2 August 1994, *José Ayala Lasso*, UN Human Rights commissioner, asked for 147 observers to monitor past and present abuses of human rights

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[1322] Brock-Utne, B., Educating for Peace (New York: Pergamon Press, 1985).

[1323] Quoted in Horace Campbell, "The United Nations and the Genocide in Rwanda", in Napoleon Abdulai (ed.), *Genocide in Rwanda* (London: Africa Research and Information Center, 1994).

[1324] "United Nations Peace Keeping", The Economist, January 25, 1994, p. 19.

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in Rwanda. He intended to deploy them by late September, at the cost of about US$2.1 million and received pledges for US$2.4 million.[1325] By early September there was one observer, *Karen Kelly*, and she had no budget, no car and no local staff. The disbursements received by the commissioner amounted to a grand total of US$420,000.[1326] *Ayala Lasso*, who had meanwhile realized the almost total disappearance of the judicial system in Rwanda[1327], returned to the subject and asked this time for US$10.5 million, in order to be able to supply ten prosecutors, nine doctors and twenty lawyers over and above the 147 observers, and provide all these people with minimum supplies and logistics. Still the money did not arrive. By mid-November, there were four observers, without any means and *Karen Kelly* resigned in disgust.[1328] Slowly, more observers came, but they were mostly inexperienced young people who often spoke no French, and no *Swahili* or *Kinyarwanda*, of course.[1329] They were mostly unable to communicate with the population except through interpreters who probably told them what they felt like telling them. The whole thing was a disaster, especially since 'according to the 1948 convention on the repression of genocide, it is not enough for prosecutors to offer the evidence of mass killings to secure a conviction: they must also prove genocidal intent'.[1330] In the meantime, hundreds of Hutus were also being massacred by the RPA in *Kabutare*, *Kibeho*, *Kivumu*, *Byangabo*, and many other areas.[1331] On 8 November 1994, UN Resolution no. 955 went ahead and created an international tribunal anyway.[1332]

3.8.2 War, peace and national borders

Although the title of this section looks beyond the subject matter of the dissertation, the author's concern here is the silence of the international community on the invasion of Rwanda. The genocide and other gross human rights abuses would probably not have occurred if Uganda and Tutsi

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[1325]Including US$233,000 from France.

[1326] US$380,000 from the United Kingdom and US$40,000 from New Zealand. Human rights in Rwanda are, in deed, an Anglo-Saxon plot.

[1327] Prunier, G., The Rwanda Crisis, at 343

[1328]SWB/Radio France Internationale, 11 November 1994.

[1329]In Kibuye, Prunier found a Human Rights Observer Station manned by five people, none of whom spoke any French. They said that a Togolese had been assigned to their team; but 'he had gone on leave'. In Kigali several UN volunteers had resigned in disgust at the ineptitude of the way the whole operation was run. Prunier, The Rwanda Crisis, at 344. For an unsparing assessment of this dismal performance, see African Rights, *Rwanda: A waste of hope*, London: UN Human Rights Field Operation (March 1995).

[1330] Andrew Jay Cohen, 'On the trail of the genocide', *New York Times* (7 September 1994).

[1331] See Desouter and Reyntjens, Les Violations des droits de l'homme par le FPR/APR, 1995.

[1332] See supra sub-section 3.

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refugees had not attacked the country, or at least, if the attack had been condemned and stopped in good time.

A country must not invade its neighbor.[1333] The Charter of the United Nations establishes the sovereign equality of nations. The supreme crime in international law is the planning and implementation of a war of aggression as was held in the Nuremberg trials and it supersedes all other war crimes committed in the execution of war.[1334] The Charter of the Organization of African Unity[1335], the African Charter on Human and Peoples' Rights[1336], and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa[1337] establish the inviolability of national borders and require states to prevent refugees in exile from using their country as launching pads to invade the country of origin.

The crisis began with the October 1, 1990 invasion of Rwanda from Uganda by part of the Ugandan army. The invasion was organized with Rwandan Tutsi exiles that, as already shown, had left Rwanda after independence in 1962. The rallying cry of the war was human rights, justice and democracy for Rwanda. The reality was rather a stop-start military invasion from Uganda and the massive slaughter of Hutu populations in power in Rwanda since independence by the Rwandan Patriotic Army (RPA) having as its political wing the Rwandan Patriotic Front (RPF). Their principal leader, General *Paul Kagamé*, had been chief of military intelligence for the Ugandan National Resistance Army (NRA) and was trained by the US at *Fort Leavenworth*.[1338]

There is credible evidence that the Ugandan government played an important role in the invasion by providing troops, allowing the RPF to move arms, logistical supplies and troops across Ugandan soil, and providing direct military support to the RPF in the form of arms, ammunition, and military equipment. Troops, trucks and weapons left *Kampala* to gather in the local football stadium in *Kabale*, 300 kilometers southwest of *Kampala* and 20 kilometers north of the Rwandan border. This movement began on September 29, 1990.[1339] Ugandan president, *Yoweri Museveni*, agreed himself

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[1333] UN Charter, art. 1 (1); 2 (4); 39; and 51, reprinted in Rifaat, A. International Aggression, 1979, p. 117-23. See also Goodrich and Hambro, "Charter of the United Nations", 3rd ed., p. 23; 342-53.

[1334] Goodrich and Hambro, p. 245.

[1335] OAU Charter, art. II (2), reprinted in Cervenka, Z., The OAU and its Charter,1968, p. 232.

[1336] Art. 23.

[1337] Art. 4.

[1338] Prunier, The Rwanda Crisis, 1995.

[1339] Human Rights Watch Arms Project, Arming Rwanda, The Arms Trade and Human Rights Abuses in the Rwandan War, Vol. 6, Issue 1, January 1994, p. 20.

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that these people were deserters from his army[1340] but documents seized from the war dead soldiers by the Rwandan army proved that they were on "official mission".[1341] Besides, none has ever been charged with desertion nor retired. Moreover, many arms used in the Ugandan army, and which were not found in the Rwandan army, were seized from RPF fighters.[1342]

During the February 1993 RPF offensive, government soldiers confiscated a Mercedes-Benz truck with an Ugandan license plate, number UWT-868, in Rwanda between *Ruhengeri* and the Ugandan border. Inside the vehicle was a document with a general order from the NRA's Military Police Headquarters. The order identifies the truck by its license plate, and reads: "It is on special duties. Assist them where necessary". Dated November 21, 1991, the order indicates that the truck had been operating under official NRA authorization 15 months before the offensive.[1343]

On several occasions throughout the war, journalists, diplomats and international military observers say that wholesale numbers of RPF troops operating in organized units have crossed back into Uganda, and have camped in border areas for months. Despite their claims that ex-NRA soldiers in the RPF would face charges "punishable by death", Ugandan authorities made no effort to arrest, deter or otherwise control these RPF forces.[1344] It would be hard to prove how a foreign force of over 10,000 troops can maintain itself at the border of a country and fight the neighbouring country for about four years without the agreement or complicity of the first country (Uganda). Besides, family members of war dead RPA officers received compensation and accommodation from the Ugandan government, according to the Ugandan legislation on war.[1345]

Several messages intercepted by government forces attest the role played by Uganda:

> "...the NRA is with us and the morale of our troops is high. The supply by air is very efficient and must be continued ...";[1346]
>
> "We continue our operations together with the NRA and the white elements ...";[1347]

[1340] Interview on the BBC in the program "Focus on Africa", 14 May 1991.

[1341] République Rwandaise, Ministère des Affaires Etrangères et de la Coopération, Données sur l'Implication de l'Uganda dans l'aggression contre le Rwanda, p. 3.

[1342] Id.

[1343] Human Rights Watch Arms Project, Arming Rwanda, at 20.

[1344] Id., at 21.

[1345] République Rwandaise, Données sur l'implication de l'Uganda dans l'aggression contre le Rwanda, at 4.

[1346] Message 15 A 7 55 B APR 94 from Mbarara (South Uganda) to Gatuna (North Rwanda).

[1347] Message 22 11 20 B APR 94 from Mbarara to Kamwezi (Uganda).

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> ... The back up as well as the war and food supplies will continue to reach you from the NRA. Will reach you without problem ...";[1348]

> "In the country of the chief [Museveni], the social, economic and political situation improves progressively. The chief backs us 100% and 10,000 men have been officially made available to us ... Land and air transport means are provided by the chief's channel ... . The movements of the White mercenaries must be always covered by NRA elements in the country ..."[1349]

The support of the RPF by Uganda was also acknowledged by a senior NRA operations officer. He affirmed that, after the failure of the RPF's October 1990 invasion, the NRA provided even heavier weaponry including artillery. He said that throughout the conflict, the NRA provided a steady stream of ammunition, food and logistical supplies, and that the two armies shared intelligence information.[1350] Moreover, the fact that the high-ranking officers in the RPA were also high ranking in the NRA puts out of doubt the planning by Uganda and its active participation in the invasion. For example, Major-General *Fred Rwigyema* who led the invasion on October 1, 1990 had successively been NRA Deputy Army Commander and Deputy Minister of Defence.[1351] Major *Paul Kagame* was Director of the Division of Military Intelligence in the NRA, while Major *Bunyenyezi* was commandant of the NRA Brigade in the East of Uganda. Major *Bayingana* was Head of NRA Health services while Colonel *Mateka* was Head of the Administration of NRA staff.[1352] Other sources indicate that between 70% and 80% of the foot soldiers in Rwanda from 1990 were genuine Ugandans, especially the *Baganda*, *Basoga*, *Acholis*, *Madi*, *Banyoro*, etc. Ugandan nationals were taken to Rwanda through different schemes. A large number serving with NRA were deployed to Rwanda whenever the RPF was losing the war. NRA mechanized battalion from *Masaka* was among the first to go in November 1990.[1353] Many *Acholis* detained in concentration camps were taken by force as a continuation of their incarceration. Ex-soldiers, who were laid off as a result of an IMF-backed military reduction programme, were rounded up and re-employed as mercenaries to Rwanda. According to returning soldiers, *Museveni* paid each one in this category 500,000 shillings up front, plus big salaries.[1354]

[1348] Message 09 12 05 B APR 94 from Mbarara for Kisoro-Kamwezi-Kasese (Uganda).

[1349] Message 04 11 30 B APR 94 from Mbarara for Kisoro-Kamwezi-Gatuna-Kasese.

[1350] Human Rights Watch Arms Project, Arming Rwanda, at 21.

[1351] He was also a particular friend of Museveni since 1972. When he got married in 1978, the reception for the wedding was organized at the Presidential Palace in the presence of Museveni. *République Rwandaise, Données sur l'implication de l'Uganda dans l'aggression contre le Rwanda, at 12.*

[1352] Ibid.

[1353] UDC Newsletter, Vol. 5, No. 3, April 1995, p. 6.

[1354] Id.

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At occasions, President *Museveni* contradicted his earlier declarations. For example, during a press conference, he said, denigrating the Rwandan army, that "I doubt very much that the troops that are there can defeat the rebel force by force. Some of them are our best people".[1355]

The participation of Uganda in the invasion of Rwanda is an act of aggression defined in resolution 3314 (XXIX) of the UN General Assembly, largely based on Article 2(4) of the UN Charter which prohibits the threat or use of force.[1356] According to Article 1, aggression is the "use of armed force by a State against another, the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition". Article 3 of the definition, listing seven specific cases of the use of armed force, states, in sub-paragraph (g), that the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State is an act of aggression. The second paragraph of Article 5, dealing with the legal consequences of aggression, followed the principles of the Nuremberg Tribunals after the Second World War. In this regard it was stated that "a war of aggression is a crime against international peace", and that "aggression gives rise to international responsibility".[1357] It is unfortunate that the Security Council remained silent on the Rwandan petition in early 1994.[1358] This was perhaps due to the fact that the petition was presented by a government which was involved in the genocide, but the fact still remains that the prosecution of Ugandan and Rwandan individuals involved in this matter would have played a great role in deterring impunity prevailing in Rwanda and in the sub-region. Instead, the United Nations military mission aided and abetted the RPF to take power: when the airplane carrying the two Hutu Presidents, *Juvénal Habyarimana* of Rwanda, and *Cyprien Ntaryamira* of Burundi was shot down at the Kigali airport in April 6, 1994, ethnic violence broke out and many thousands of Tutsi and Hutu died before the cameras of the Western media and in the presence of the UN military mission. It is during the ethnic carnage that the UN decided to withdraw from Rwanda, leaving its military equipment to the RPA, after the Security Council had voted an arms embargo against the Hutu government. As a consequence, the absolutist Hutu Government was replaced by an absolutist minority Tutsi with no proposed majority rule and provisions for minority rights, no prospect for elections - they are

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[1355] Press conference, Kampala, 10 October 1990.

[1356] It was also a violation of the OAU Charter which provides for the non-interference by a State in internal affairs of another State (par. 2), the respect of State sovereignty and territorial integrity (par. 3), and the condemnation of subversive activities from neighboring States ... (par. 5).

[1357] Article 5(2) of the definition. See comments on this provision in Ferenscz, B.B., "A Proposed Definition of Aggression: By Compromise and Consensus", 22 I.C.L.Q. (1973), p. 43-5.

[1358] For details about this petition, see République Rwandaise, Données sur l'implication de l'Uganda dans l'aggression

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specifically forbidden - and the imprisonment of over 130,000 Hutu men and children (and some women) all "accused" of genocide.

Meanwhile, there was complete silence in most circles about the military intervention from Uganda in violation of the basic principles of international and African law. Nothing has been done about the crime of planning and waging a war of aggression as defined in the Nuremberg trials, in spite of the omnipresent propaganda about war crimes. The search for and prosecution of war criminals was a common theme in the media: "never again", it was repeatedly stated.[1359] Reference was made to the legacy of Nuremberg but almost no one spoke of the major crime defined by Nuremberg: that of planning and waging of aggressive war as undertaken against Rwanda.[1360] Crimes alleged are limited to international humanitarian law, which deals only with violations committed in the conduct of war, and which puts its head in the sand with respect to the crime of planning and waging war.[1361]

The same violation of international law occurred in former Zaïre. Under the rallying cry of democracy, human rights and the protection of the rights of the Tutsi minority, the Ugandan-Rwandan army covertly invaded eastern Zaïre, beginning in September 1996. The apparent target was the ailing dictator, *Mobutu*. The first victims were the virtually defenseless Hutu in the refugee camps in Eastern Zaïre. After intensifying the invasion and bombing the refugee camps with heavy artillery in November 1996, the invading army chased most of the refugees into eastern Zaïre. Some 500,000 returned to Rwanda under the guns of their enemies and the abandonment by the HCR and other international aid organizations. In eastern Zaïre, hundreds of thousands of men, women and children were starved, killed by illness or systematically massacred in cold blood out of sight of the international media excluded from the area.

The international non-governmental organizations actively supported the RPF military invasion of Rwanda and then of Zaïre (Democratic Republic of Congo), all in the name of human rights and democracy. Instead of human rights and democracy and the rule of law after the horrible interethnic violence of April to July, 1994, we have seen more war, military dictatorship by the Tutsi minority in Rwanda, concentration camps for the Hutu population in Rwanda, and the racist murder of hundreds of thousands of Hutus. As a consequence, the fundamental principle of the right to peace and the right to life has been held up to ridicule, which makes the concept of human rights in the UN suspect.

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contre le Rwanda, p. 12-43.

[1359] La Libre Belgique, 24 May 1994; Le Soir, 9 October 1990; Le Monde, 7 October 1982.

[1360] Even the next war against Zaïre will not be echoed in the United Nations.

[1361] See Statutes of the International Criminal Tribunal for Rwanda, Art. 4.

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It would seem that there is a new right of intervention by foreign powers supported actively by the organizations of the United Nations in Geneva and elsewhere.

3.8.3 Refugee law

The area of refugee law came to maturity after the Second World War with the establishment of the High Commission for Refugees and the adoption of the Geneva Conventions in 1951 and 1967. The High Commission for Refugees (HCR) has as its primary role the protection of refugees. According to Section 32 of the Convention on the Statute of Refugees, refugees under no circumstances are to be returned to the country they have fled without their consent. Refugees enjoy political and civil rights.

The same shameless abandonment of principle in international law is present in the treatment of refugees: Hutu refugees have been attacked militarily by the RPA they had fled with the complicity of the High Commission for Refugees whose primary duty is to protect them. The HCR illegally repatriated Hutu refugees against their will into the arms of the Tutsi dominated Government.[1362]

In late 1996, the HCR and the RPF jointly asked the Government of Tanzania to expel the hundreds of thousands of Hutu refugees by force.[1363] This was done. As early as September 1995, the HCR had suggested forced repatriation of refugees. In November 1996, the largest refugee camp in the world in Eastern Zaïre was shelled by the heavy artillery of the Rwandan and Ugandan armies under the pretext that it hosted 40,000 former Rwandan soldiers and militia who had participated in the genocide. The international community and the HCR abandoned these refugees to the oncoming armies. Amnesty International was one of the few international organizations to condemn this mistreatment of the Hutu refugees.[1364] Some 500,000 were forced to return to Rwanda: young men as well as many others were sorted from these returnees and killed or imprisoned.[1365] The majority fled the camps further into Eastern Zaïre, one of the most inhospitable jungle areas in the world. President *Yoweri Museveni* was quoted in Africa International in February 1997 as saying that they had to be destroyed: "it was not enough to drive them from the border.[1366] Hundreds of thousands of

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[1362] Griggs, 1997, at 8.

[1363] Matata, Report 1997.

[1364] AI Report 1997.

[1365] Id.

[1366] Africa International, quoted in Griggs, 1997, at 7.

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men, women and children were starved or killed using some of the extermination tactics alleged during the RPF invasion of Rwanda some years earlier".[1367]

According to many sources, a favorite tactic was for the HCR to group the fleeing refugees from Eastern Zaïre together and then the Rwandan-led army would attack and exterminate them. For refugees, it is imperative to point out that the HCR failed to protect them. It adopted and promoted the RPF propaganda that the refugees were "hostages of the former Rwandan army and the Hutu militias". This propaganda was repeated by the RPF government in many instances in the UN, to the donor community and to diplomatic mission in order to gain international sympathy. It is certain that the former army and government needed support of the Hutu population to legitimize its return into power, as the RPF needed Tutsis to do so, but it is an exaggeration to say, as the Tutsi government and some NGO's have been doing, that all of the two million Rwandans who lived in exile in the DRC were "manipulated" by that army and the militia to remain in exile as a shield to facilitate the regrouping, rearming and launching of the incursion into Rwanda. Such an exaggeration conceals the fundamental reason for fleeing and remaining in exile for Hutus. Being a refugee himself, the author of this dissertation and his family, as well as many other people he knows, were never forced by any former Rwandan army soldier or Hutu militia to leave their country and remain in exile. Exile was due, in general, to the insecurity resulting from the RPF massacres of the Hutu population since 1990, followed by the 1994 genocide of Tutsis by Hutu elements. As there was no sign of peace should the RPF seize power or the then ruling Hutus remain in it, there was high risk of losing one's life by not fleeing. Unfortunately, the entire Hutu population in exile was presumed *génocidaire*. For example, in April 1995, *Salgado* wrote that "these Hutus had left Rwanda fleeing reprisals or simply justice".[1368] He described the camps as "the highest concentration of murderers" worldwide.[1369] As a result, even those who did not stay in camps for a long time where considered by some outsiders as "murderers". For example, during his interview by the Zambian department of refugees, the first question the author was asked was "how many people did you kill?" Not surprisingly, the same question was repeated by some individual Zambians who were led to believe that every Hutu had participated in the killings. However, the slaughter of thousands of Hutus by the RPF was alleged to

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[1367] Matata, Report 1997.

[1368] Sébastien Salgado, "Les Camps des Tueurs" *in Paris Match*, 27 April 1995. Author's translation.

[1369] Id. Human Rights wrote that "The former government led some two million Rwandans into exile". *Human Rights, World Report, RWANDA, 1999.*

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be "isolated exceptional acts by a few members" of a generally disciplined and principled army.[1370] At the time of writing this dissertation, these "few members" are still in the RPA, many of them have been promoted to upper echelons while evidence is growing of their continuous elimination of innocent people in Rwanda[1371] and the DRC.[1372] Besides, the author has interviewed at least 50 Hutus in different countries[1373] who managed to re-flee after the forced repatriation.

That the HCR illegally participated in the forced repatriation of the Hutu refugees against their will was a violation of international law guaranteeing refugees the right to return home only when they, themselves, think that there is no more "fear of being persecuted". Finally, the HCR has now ostensibly decided to try to protect some of the refugees who have returned to Rwanda and, as reported, help the RPF sort out *génocidaires* from the returnees.[1374] This is outside the mandate of the HCR, since these people are no longer refugees. In spite of the good will of some of the HCR "helpers", the HCR carried out part of the RPF plan to have Hutus under its control and treat them as it wishes. The HCR role as a protector has been transformed to its opposite and it has become an agent of the RPF in the persecution of the Hutu majority.

These activities and the apparent politicization of the HCR in favour of the winning party in the conflict is a bad precedent which bodes ill for refugees in future conflicts. Moreover, it brought under suspicion the international protection of human rights among Hutus whose attitude towards the UN is "we have no right in this world at all".[1375]

3.8.4 The International Criminal Tribunal for Rwanda (ICTR) and impunity

The response of the international community to the massacres and genocide was at times "reluctant"[1376] and "inadequate".[1377] This can partly be explained by the amount of human and

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[1370] During a press conference in Kigali in June 1995, Major-General Kagame rejected the responsibility of the RPA, saying that "one or two isolated incidents should not involve our army". Asked what he thought about "isolated cases" which had become common for the majority of RPA soldiers, he said "this is polemic".

[1371] For example, the author's sister was murdered with her husband and their four children, while his mother was murdered in Zambia by a death squad organized from within the RPA to eliminate the members of that family in order to eliminate evidence of the murder of his father in 1994 by Tutsi soldiers, as well as to avoid any possible claim against the illegal occupation and exploitation of their properties by high-ranking military officers in government.

[1372] Matata, May 1999.

[1373] Most of them are found in Australia, Belgium, Canada, Denmark, France, Germany, Holland, Ivory Coast, Kenya, New Zealand, Nigeria, South Africa, United States, Zambia, etc. For their own security, their names are not given here.

[1374] Matata, May 1999.

[1375] See Karemano, C., "The Defenseless Hutus", *Rwandafor*, July 1998.

[1376] The international community largely stood by and watched the atrocities in Rwanda. Human Rights Watch, The

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material resources that would have been required to restore peace and address the more fundamental issues of the failure of the State itself.[1378] The Rwandan experience does, however, also raise serious questions about the adequacy of international and regional structures responsible for maintaining and restoring peace.

By resolution No. 955[1379], the United Nations Security Council determined to establish an international tribunal with the objective of prosecuting and, where appropriate, sanctioning certain violations of international humanitarian law. This has been one of the most significant international responses to the genocide and other violations of international humanitarian law that took place in Rwanda. The international community apparently hoped to do in court what it had not been able to do in time. According to *Shattuck*, "the establishment of criminal responsibility for genocide is crucial if we are to differentiate victims from aggressors, foster social reconciliation and overcome the cynical argument that ethnic conflicts cannot be resolved".[1380] However, the statute has established some limitations (*ratione loci, ratione temporis, ratione personae* and *ratione materiae*) which frustrate the realisation of the Tribunal's goal of ensuring "effective redress", in particular by hampering exploration of complicity in what may have been a carefully orchestrated campaign in Rwanda. These limitations do not find any justification in international law.

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aftermath of Genocide in Rwanda. Absence of Prosecution, Continued Killings 1 (1994).

[1377]In a report to the Security Council, the Secretary-General wrote that the international community's delayed reaction to the genocide "demonstrated graphically its extreme inadequacy to respond with prompt and decisive action to humanitarian crises entwined with armed conflict". In his opinion, the entire system needed to be reviewed to strengthen its capacity to react. *The United Nations and the situation in Rwanda,* UN reference paper, April 1995, p. 13.

[1378]Mariam Meier Wang, "The International Criminal Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact", *Columbia Human Rights Law Review, Vol. 27: 177, 1995, p. 183-226*; Lauras, D., "Le Fossé demeure entre le Tribunal International d'Arusha et le Rwanda, *Agence France Presse*, 10 October 1997; Erasmus, G., and Fourie, N., 'The International Criminal Tribunal for Rwanda (hereinafter ICTR). Are all issues addressed? How does it compare to South Africa's Truth and Reconciliation Commission?' *in: International Review of the Red Cross, No. 321, Nov-Dec 1997, p. 705.* According to estimates of the situation in late 1994, of a total population of approximately 7 million, as many as 500,000 Rwandans had been killed, 3 million had been internally displaced and over 2 million had fled to neighbouring countries. *The United Nations and the Situation in Rwanda, 1995, at 17*; See also Guy Vassall-adams, Rwanda: An Agenda for International Action (1994); Robert Block, *The Tragedy of Rwanda*, N.Y.Rev. of Books, Oct. 20, 1994, at 3; Human Rights Watch Africa, Genocide in Rwanda: April-May 1994 (1994) [hereinafter Genocide in Rwanda]; *Human Rights Questions: Human Rights Situations and Reports of Special Rapporteurs and Representatives: Situation of Human Rights in Rwanda*, U.N.GAOR, 49th Sess., Agenda Item 100(c), U.N.Doc. Q/49/508 (1994) [hereinafter Report of Special Rapporteur]; *Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (1994),* U.N. SCOR, U.N. Doc. S/1994/1125 (1994) [hereinafter preliminary report].

[1379]*S.C. Res. 955, U.N SCOR, 49th Sess., 3453d mtg., November 8, 1994, at 1, U.N. Doc. S/RES/955 (1994)* (hereinafter Statute of the International Criminal Tribunal for Rwanda).

[1380]John Shattuck was the US Assistant Secretary of State for Democracy, Human Rights and Labour. Shattuck, J., Testimony before the House of Representatives subcommittee on Africa, 22 February 1995, quoted in Karemano, *The Rwandan tragedy, at* 82.

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The shortcomings: The Statute of the ICTR describes the mission of the tribunal and places at least four significant restrictions on the Tribunal's authority. First, in Articles 7, 8, and 15, it limits the *ratione loci* competence of the Tribunal to serious violations of international law committed in Rwanda itself, or those violations committed in neighbouring States by Rwandan citizens, thereby excluding consideration of other crimes directly related to the 1994 massacres but that were committed outside Rwanda and its neighbouring States.

Secondly, in the same Articles, the *ratione temporis* competence of the Tribunal is too restrictive, for it covers only the period between January 1 and December 31, 1994. Third, as regards the *ratione personae* competence, in Article 5, the Tribunal is foreclosed from addressing wrongdoing committed by entities commonly treated as persons before the law and subject to legal constraint (such as international organisations, States, and public and private enterprises) because its purview is limited to jurisdiction over "natural persons." Lastly, concerning proceedings and punishment, the statute provides only for criminal proceedings and imprisonment.

It should be pointed out that these four restrictions are not required by the rules of international law that the Tribunal is entrusted with enforcing. Following the Genocide Convention, Article 3 of the statute charges as punishable not only the crime of genocide per se, but also "conspiracy to commit genocide", "direct and public incitement to commit genocide", "attempt to commit genocide", and "complicity in genocide".[1381] In theory, persons committing genocide or any of these acts must be punished, whether they, constitutionally, are rulers, public officials or private individuals.[1382] As noted by the United Nations Commission of Experts reporting on the situation in Rwanda, "the prohibition on genocide has achieved the status of *jus cogens*, and accordingly binds all members of the international community, regardless of whether their States have ratified the Genocide Convention".[1383]

The four restrictions severely constrain the Tribunal's authority to address complicity in the genocide and other crimes committed in connection with Rwanda. The author agrees that the Article makes practical sense, especially when examining the circumstances surrounding the atrocities of the Rwandan situation. Given the general history of the Banyarwanda diaspora,[1384] and the effect of

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[1381] Art. 2 (3)

[1382] Art. 4.

[1383] *UN Commission of Experts* Established Pursuant to Security Council Resolution 935 (1994) on Rwanda, *Final* Report, Geneva, 25 Nov. 1994.

[1384] The genesis of the Banyarwanda diaspora is complex and at least threefold in origin: the Hutus and Tutsis who found

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those cross-border connections and attachments that partially caused crimes to spill over borders in 1994, it seems only logical to allow the Tribunal to prosecute atrocities that occurred both inside and outside the borders between Rwanda and Burundi, Uganda, Tanzania, or Zaïre. But while retaining some flexibility for the Tribunal by referring to "neighbouring countries" generally, rather than specifying a list of countries, the Statute also carefully limits the jurisdiction of the Tribunal over crimes in neighbouring countries by specifying that the violators be Rwandan citizens. However, this qualifier may be less clear than it first appears. Given the many years of Hutu and Tutsi movement throughout the area of Rwanda, Burundi, Tanzania, Zaïre, and Uganda, determination of who is a Rwandan citizen is not at all clear.[1385] Laws regarding citizenship, particularly for refugees who fled Rwanda during the Hutu regime, have been constantly in flux; indeed, this was one of the issues over which the RPF and the former Rwandan government disagreed.[1386] The author contends that, if Rwandans and persons of every nationality are bound by the principles of international law in question, they are so bound, no matter where their acts were committed. As a consequence, the geographic limitation on the Tribunal's competence has no justification. It prevents the ICTR from investigating and prosecuting acts committed elsewhere that relate directly to the 1994 massacres in Rwanda and are otherwise punishable under the statute as crimes against international law. For example, people from Burundi and Zaïre who came to Kigali and other areas to help Hutus kill Tutsis[1387] are not covered. Also, Rwandan Ambassadors who, before 1994, negotiated and facilitated the purchase and shipment of arms to be later distributed to the *interahamwe* militia would not be prosecuted and punished.[1388]

Second, covering only the period between January 1 and December 31, 1994[1389] constitutes a handicap for the Tribunal in punishing all the crimes violating international humanitarian law and

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themselves in Uganda and Zaïre when colonial powers determined Rwanda's borders in 1910; the Hutus (and some Tutsis) who were economic migrants in the early twentieth century and went to work on plantations in Uganda and Zaïre; and the Tutsis who fled their homes because of the violence directed against them in Rwanda. See, Guichaoua, A, Le Problème des Réfugiés Rwandais et des Populations Banyarwanda dans la Région des Grands Lacs Africains, Geneva: UNHCR, 1992; Vassall-Adams, Rwanda: An Agenda for International Action, at 14.

[1385] Ibid.

[1386] One of the requests from the Rwandan Banyarwanda was "a sense of national identity, to have citizenship, and the protection of the Rwandan flag". *See Human Rights Watch, Arming Rwanda, 1995, at 7.* Meetings with the heads of State of Burundi, Uganda, Tanzania, and Zaïre, as well as with representatives of the Organization of African Unity and the UN High Commissioner for Refugees, eventually resulted in the 1991 Dar-es-Salaam Declaration which gave Rwandan refugees the choice of becoming citizens of Rwanda or of their host countries. *Vassal-Adams, Rwanda: An Agenda for International Action, 1994, at 22.*

[1387] During the genocide, this was called *"gutanga umuganda"*.

[1388] The names of these ambassadors are not given here for security reasons.

[1389] ICTR Statute, art. 1.

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eradicating the culture of impunity in Rwanda. Under Article 2(3) of the Statute, as well as under Article 3 of the Genocide Convention, wrongs punishable on the same terms as genocide - including conspiracy to commit genocide, incitement to genocide, attempt to commit genocide, and complicity in genocide - necessarily include acts committed prior to, and after, the genocide itself. Furthermore, irrespective of the *ratione temporis* competence, Article 6 of the Statute concerning individual criminal responsibility would presumably cover acts such as planning, instigating, ordering, or otherwise aiding and abetting a crime that commenced prior to January 1, 1994, so long as there was a causal nexus between those acts and the completion of the crime during 1994. That is, there is a continuum of criminal responsibility that extends from the planning and preparation phases to the execution phase of the genocide.[1390] Certain sources indicate that the Rwandan genocide was a carefully orchestrated event, for which planning had begun earlier than 1994. In 1993, several NGO's[1391] had notified the international community of "massive and systematic human rights violations," and in July 1994, the United Nations Commission of Experts found that public and private parties were openly encouraging genocide.[1392] This is corroborated, according to the Commission, by, *inter alia*, a statement made on November 26, 1992 by *Dr Léon Mugesera*, one of the advisers of President *Habyarimana,* in which he called for the extermination of the Tutsis in what is described as a "final solution, Rwandan-style."[1393] This statement could be seen as an incitement to genocide as provided for under Article 2(3) of the Statute. It would seem far more appropriate to cover an earlier period during which the planning, organisation, and perpetration of genocide acts were alleged to have taken place. Moreover, while the RPF arguably was in control of the country by July 17, 1994, there is no guarantee that atrocities suddenly stopped on that date or even on December 31, 1994. Crimes by the former government against Tutsis and opposition members could certainly have continued, even if only in "neighbouring states".[1394]

According to the United Nations Commission of Experts report, "extremist militias from the majority Hutu tribe attempted in a three-month campaign to exterminate the Tutsi minority before they were

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[1390]Akhavan Payam, 'The International Criminal Tribunal for Rwanda: the politics and pragmatics of punishment' *in: American Journal of International Law*, vol. 90, July 96, p. 506.

[1391] Africa Watch and Amnesty International published the details of these human rights violations, and in March 1993, an International Commission on Human Rights produced more findings. *See* Africa Watch, Talking Peace and Waging War (1992); Amnesty International, Persecution of Tutsi Minority and Repression of Government Critics 1990-1992 (1992); Africa Watch, Beyond the Rhetoric: Continuing Human Rights Abuses in Rwanda (1993).

[1392] The UN and Rwanda 1993-1996, at 12, par. 44.

[1393]*Ibid.*

[1394] ICTR Statute, art. 1.

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defeated by a Tutsi-led guerrilla force" in July 1994.[1395] The fundamental reason why the militias suddenly decided to do this, and how the Tutsi-led guerrilla force arose, are not explained. In the United Nation's official interpretation the context of the war - a struggle for State power between opposing political forces - was ignored altogether. Earlier developments presented in this dissertation showed that the RPF, instead of fighting for 'democracy and human rights', fought to establish a *de facto* one-party Tutsi-controlled state. It will shortly be shown that the Tutsi army has massacred thousands of Hutus. Furthermore, the Commission stated that acts committed by Tutsi elements were not intended to destroy the Hutu ethnic group.[1396] For Hutus who have been experiencing the atrocities, this would mean that 'Hutus wanted to destroy Tutsis whereas Tutsis wanted to spare Hutus during the civil war launched in October 1990'. The ICTR and Rwandan courts have been working in this climate of mutual suspicion among Rwandans and no Tutsi has been arrested and prosecuted so far. However, the Rwandan Patriotic Army, in power since July 1994, has committed odious crimes since October 1990, when the RPF started the war and those crimes were reported as "against humanity" and even as "genocide" by some sources.[1397] It is sufficient to skim through some subsequent reports to show that prosecution of the only Hutus, as the ICTR is currently doing, is selective justice in the eyes of Hutus and is not conducive to reconciliation and peace.

On 19 February 1993, the academic and administrative staff of the University of Rwanda appealed to the UN Secretary General, the Pope and several Western powers to convince the RPF to stop the "genocide" against Hutus in the areas it had conquered. They reported 48,500 people massacred.[1398] The letter received no answer.[1399] In 1992, a Rwandan human rights organisation,

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[1395]See Preston, J., Washington Post, November 11, 1994.

[1396]*The United Nations and the Situation in Rwanda*, at 19.

[1397]Id. See also Africa Rights, Rwanda: Death, Despair and Defiance, Report, September 1994. Although the genocide and political massacres committed by the former Rwandan government were fairly documented and adequately reported by international news media, little has been said on odious crimes committed by the RPF before, during and after the resumption of the war in April-July 1994. This is due to many reasons among which the main one is that the genocide committed by the adversary of the RPF contributed decisively towards this silence: ill-informed people reasoned in terms of "good ones" and "bad ones", and since the bad ones were known (i.e. Hutu), the others were the good ones. What if both sides were "bad"? In fact, as said, the RPF committed odious crimes since October 1990, when it started the war. Although this was reported by some International Human Rights Organisations (See (Letter to) "Imo. Sr. D. Boutros Boutros Ghali, Secretario General de la ONU" Madrid 30 May 1994 by Groupo "Solidaridad y Ayuda Humanitaria a Rwanda"; Human Rights Watch/Africa, "Immediate Communiqué", June 6, 1994; Amnesty International, "Rwanda: Reports of Killings and Abductions by the Rwandan Patriotic Army, April-August 1994, October 20, 1994; Human Rights Watch/Africa, "The Aftermath of Genocide in Rwanda", September 1994; Human Rights Watch/Africa, "Rwanda: A New Catastrophe?", December 1994; European Parliament, "Report of the European Parliament Mission to Rwanda, 27-31 July 1994" in Documents of the European Parliament Session, August 23, 1994), the human rights violations by RPF were never subjected to serious investigations.

[1398]According to the letter, "... nous assistons avec impuissance à un génocide des milliers de civils innocents dans les préfectures de Ruhengeri et Byumba dont les estimations s'élèvent à 48,500 répartis comme suit: RUHENGERI: Kinigi (3,000 personnes); Kigombe (9,000 personnes); Nkumba (3,500 personnes); Kidaho (5,000 personnes); Butaro (7,000

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Association pour la Défense des Droits et Libertés (ADL) had already published a list of 790 victims of the attacks by RPF[1400] and *Groupo Solidaridad* had mentioned that RPF was committing "genocide" against Hutus[1401]. *Human Rights Watch* confirmed the killings[1402] and Amnesty International specified that the RPF invited people at several occasions since 1991 through July 1994 to a 'pacification meeting' and gunned them as they were gathered. Corroborating *Refugee International*, *Amnesty International* indicated that RPF had deliberately killed people since April through August 1994 in *Kigarama, Nyamugali, Gisenyi, Nyarubuye, Rushinga, Musasa,* and all *Rusumo.*[1403]

Priests refugees in *Goma* affirmed in a letter dated August 2, 1994, addressed to *Pope John Paul II*, that the RPF targeted "particularly Hutu intellectuals but also killed people who did not know how to read and write".[1404]

In August 1994, the UN Secretary-General, *Boutros-Boutros Ghali*, opposed the *Gersony* findings that established crimes perpetrated by the RPF.[1405] Thus, the document was embargoed and was simply shelved.[1406]

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personnes); Cyeru (2,500 personnes), Nyamugali (2,500 personnes); BYUMBA: Tumba (2,000 personnes); Kivuye (1,900 personnes); Muvumba (3,000 personnes); Cyumba (1,500 personnes); Cyungo (900 personnes), Kiyombe (700 personnes); Sous-préfecture de Ngarama: 6,000 personnes. *Letter entitled 'Dénonciation du Génocide perpétré par le FPR au Rwanda', Université Nationale du Rwanda, Butare, 19 February 1993.*

[1399] This was confirmed by 5 of the signatories that the author interviewed. For their own security, their names are not mentioned here.

[1400]Desouter and Reyntjens, Les Violations des droits de l'homme par le FPR/APR, 1995.

[1401]See also Africa Rights, Report, September 1994; HRW/Africa, Rwanda: A New Catastrophe?, December 1994.

[1402]Human Rights Watch/Africa, *Communiqué Immédiat*, 6 June 1994.

[1403]Amnesty International, Rwanda: Report of killings and abductions by the Rwandan Patriotic Army, April-August, 1994, 20 October 1994.

[1404]The author is in possession of a copy of the letter.

[1405]After the RPF victory, the UNHCR sent a three-person mission headed by *Robert Gersony* to find ways to speed the repatriation of the over two million refugees who had fled the country since April 1994. They became convinced in the course of the work that the RPF had engaged in "clearly systematic murders and persecution of the Hutu population in certain parts of the country." *Haut Commissariat des Nations Unies pour les réfugiés, "Note, La Situation au Rwanda," Confidentiel, September 23, 1994, p. 4.* Although few in number and pressed for time, the team covered more of RPF territory and spoke to a wider number and variety of witnesses than any other foreigners working in Rwanda during this period. They were permitted to travel freely by the RPF, which may have expected the results of their work to support their efforts to bring the refugees home. From August 1 through September 5, the team visited ninety-one sites in forty-one of the 145 communes of Rwanda and gathered detailed information about ten others. In these places, as well as in nine refugee camps in surrounding countries, they conducted more than two hundred individual interviews and another one hundred discussions with small groups. They found the information provided by witnesses detailed and convincing and they confirmed the most important parts of accounts by independent sources in other camps or inside Rwanda. *Ibid., pp. 1-2.* In the northwest, they gathered data on an alleged RPF massacre on August 2 of some 150 persons who had been trying to return to Rwanda from Zaire and they noted systematic and arbitrary arrests and "disappearances" of adult men in the prefecture of Gisenyi. But their harshest criticism dealt with the prefectures of the south and southeast: *Butare*,

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On December 9, 1994, the UN Secretary-General transmitted to the Security Council a report of the Commission of Experts that concluded, *inter alia,* that "crimes against humanity and serious violations of international humanitarian law were committed by individuals of both sides of the conflict". He recommended that "an international tribunal should be established and that investigation of violations of international humanitarian law and of human rights law attributed to the Rwandan Patriotic Front be continued by the Prosecutor of the ICTR".[1407]

On 27 February 1996, *Libération* established the "responsibility of the RPF for killing over 100,000 Hutu within 22 months since it had seized power".[1408]

In October 1997, Human Rights Watch reported that the RPA had gone to the DRC where its soldiers proceeded to a systematic selection of Rwandan Hutu refugees that resulted in young men, former military or militia, former members of government, and intellectuals being selected for execution.[1409] Rwandan Vice-President, Minister of Defence and President of the RPF, *Paul Kagame*, had earlier confirmed that his troops were "operating" in Congo[1410] and, later, reports stated that about 200,000 Hutus were killed in the DRC.[1411] In this regard, Human Rights Watch listed a number of alleged war crimes and crimes against humanity committed between October 1996 and May 1997. It accused the Rwandan Patriotic Army of having carried out massive killings of civilian Rwandan refugees camped in the former Zaïre and the international community, including the United Nations, of having "deliberately turned a blind eye to the killings in Rwanda and the DRC". It "urged the international community to desist from glossing over human rights abuses in both Rwanda and the DRC but to ensure that all the culprits account for their atrocities". For those atrocities

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part of *Kigali*, and *Kibungo*, particularly those communes adjacent to the border. They reported massacres following meetings convoked by the authorities, and the hunting down and murder of people in hiding. They also reported ambushes and massacres of persons trying to flee across the border to Burundi. They stated that the victims were killed indiscriminately, with women, children, the elderly, and the handicapped being targeted, as well as men. They concluded that "the great majority of these killings had apparently not been motivated by any suspicion whatsoever of personal participation by victims in the massacres of Tutsi in April 1994." *Ibid., p. 3.* They added that in some cases, repatriated Tutsi refugees had joined the RPF in attacking local Hutu. They stated that during the last week of August and the first week of September, some five bodies a day on the average had been pulled from the Akagera River, many of them with their hands and feet bound. *Ibid., p. 3. See also Desouter and Reyntjens,* Les Violations des droits de l'homme par le FPR/APR, *1995, at 6; La Lettre du RDR, No. 6-7, 1-15 April 1996, p. 1.*

[1406] Nsengiyaremye, The unknown tragedy, at 120.

[1407] *United Nations and the Situation in Rwanda, at* 19.

[1408] Libération, 27 February 1996, quoted in *La Lettre du RDR, Nos. 6-7, 1-5 April 1996, front page.*

[1409] Human Rights Watch/Africa and Fédération Internationale des Droits de l'Homme, October 1997, Vol. 9, No. 5 (A), p. 14.

[1410] John Pomfret, 'Rwandans Led Revolt in Congo', Washington Post, July 9, 1997.

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committed after 1994, it even suggested that the powers of the ICTR be extended to cover those who committed similar atrocities in the neighbouring DRC.[1412]

In September 1997, it was reported that "Rwandan Intelligence agents", in connection with certain Zambian immigration and police officers, were "abducting Hutus in Zambia".[1413] Frustrated, a number of refugees fled Zambia to seek asylum in other countries.

In stead of trying to understand what happened, the UN limited the Tribunal's competence to events immediately preceding or following the Rwandan genocide, which inappropriately undermines the scope of complicity and prosecution of other crimes against humanity that should be explored. As only Hutus are subjected to criminal trials, one has reason to fear that the ICTR will not achieve what it is supposed to do, that is, contribute "to the process of national reconciliation and to the restoration and maintenance of peace".[1414] It is feared that justice will not be seen to be done, that the process will be viewed as partisan and that it will not be able to contribute to stability.[1415] A number of Rwandans agree that by prosecuting one side of the conflict, the ICTR is conducting a "show trial"[1416] which, to a certain extent, supports those Tutsis in the army and probably in government, who are walking free despite their responsibility in the massacres. "There will be no faintest glimmer of reconciliation as one party is [demonised] while the other is cherished by the UN [who is] supposed to safeguard peace and security in the world".[1417]

While atrocities, as shown, began with the invasion of northern Rwanda by the RPF at the beginning of 1990, and culminated in the RPF's assumption of State power in July 1994, the tribunal's time span of investigation is different: "from 1 January 1994 to 31 December 1994". While there is ample evidence to show that atrocities were committed on both sides, only those committed by the Hutu militias are being investigated, since, the argument goes, only they constitute 'genocide and crimes against humanity'. One of the more grotesque consequences of the differential treatment of RPF and Hutu militia massacres is that the corpses at the sites of militia massacres have been left as found some "months ago" as a permanent display for fact-finding missions, while those resulting from RPF

[1411]See for example Matata, Une épuration ethnique en République Démocratique du Congo, CLIR, May, 1998; GEAPO, Rwanda: Quel Avenir?, Kivu, February 1998.

[1412]PANA, 15 March 1998. For acts committed in 1994, the DRC should be covered as a "neighbouring State".

[1413]The Post, No. 815, Tuesday, September 23, 1997; Amnesty International, Urgent Action, September 1997.

[1414] Res. 955 (1994) of 8 November 1994, Preamble.

[1415]See Johan Scheers, quoted in *Agence France Presse, 12 September 1997.*

[1416] See discussions on Rwandanet, 1996-May 1999.

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atrocities, for example at *Kibeho* in 1995 where about 8,000 people were gunned down by the RPA, were hastily disposed of in all-night burial sessions.[1418] Moreover, regarding people dumped in the rivers or burned[1419], the author has interviewed Hutu survivals who affirmed that Tutsi army soldiers threw hundreds of Hutus in the *Akagera* river and burnt many others in their houses and in the bushes where they had taken refuge.[1420] If the UN is to be neutral and fair in meting out its punishments, it certainly must care to examine potential atrocities committed by both sides in the conflict. Both the late January 1, 1994, commencement date and the early 31 December 1994, closing date could prevent investigation and prosecution of certain crimes.

Apart from the allegations already indicated, the United Nations High Commission for Refugees published a report in September 1995, subsequently supported by Amnesty International[1421] in which it held that the RPF had conducted revenge killings after taking power "on a systematic basis", with at least 30,000 casualties. The other allegation, made by journalists and non-governmental organisations workers, was that "the RPF killings of refugees at *Kibeho* camp were unprovoked massacres".[1422] Furthermore, the author has received 31 letters from different Rwandan individuals from 6 *préfectures* affirming that RPA targets have been "Hutu males, educated, former politicians, civil servants, or army soldiers, and physically fit".[1423] All these facts establish that the RPF/RPA has been responsible for considerable killings.

According to Article 2 of the statute of the ICTR, repeating provisions of the Genocide convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such:

> (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.

[1417] Id.

[1418]The victims were, however, under the 'protection' of UN forces. *See Nsengiyaremye*, The unknown tragedy, *at 59.*

[1419] Africa Rights (1994), Rwanda: Death Despair and Defiance, September 1994.

[1420] The names of the interviewed cannot be disclosed.

[1421]Amnesty International, Report, 1995.

[1422]*La Lettre du RDR,* No. 6-7, 1-15 April 1996.

[1423] 23 of these letters emanate from persons who have lost their relatives in such killings, whence this source is reliable. For the security of these persons, their names are not given here.

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In addition, the tribunal, under the terms of Article 3, has wider powers to prosecute individuals guilty of crimes against humanity, which are 'committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds'. Those crimes are: murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds; and other inhumane acts.[1424] The ICTR should investigate, prosecute and punish, where possible.

The third limitation of the Statute is found in Article 5 that unjustly excludes from liability entities other than "natural persons". Although international law rejects the criminal liability of States and legal persons, these have long been held responsible for breaches of international obligations. Where international obligation in question is one of essential importance, such as the prohibition against genocide, it is a serious breach of that obligation by a State to constitute an international crime. While States have been reluctant to acquiesce in the jurisdiction of any international court to consider such charges, and have interposed sovereign immunity defence in national courts, the assertion of State prerogatives in the face of universally-recognised norms is increasingly dubious. This can also apply to corporations and other legal organisations that are subject to criminal liability under national legal systems for which international law is increasingly recognising the role in international affairs and the need to subject them to the provisions of international law. In fact it has been reported that some states and some organisations based in those states or elsewhere have been providing arms and military equipment to the former Rwandan government and to the RPF, despite evidence of their intended purpose.[1425] It is therefore appropriate for the Security Council to consider the possibility of States' criminal liability as regards the Rwandan genocide.

However, given the complexity of the criminal liability of States and other legal persons, the issue should be examined together with the fourth restriction whether imprisonment is the only criminal sanction that should be applied by the Tribunal. It should be taken into account the fact that there is no provision nor principle of international law suggesting that imprisonment or even criminal sanctions must be the exclusive remedy for the crimes the Tribunal is presently charged with investigating. For example, under Article I of the Genocide Convention, parties to the Convention confirmed that they undertook to "punish" genocide, and under Article V further pledged to "provide effective penalties" for persons found guilty of acts proscribed under the Convention. In addition to

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[1424] Res. 955 (1994), 5 November 1994.

[1425]Human Rights Watch gives a detailed report on arms flows to the Government of Rwanda and to the RPF. *See Human Rights Watch, Arming Rwanda: The Arms Trade and Human Rights Abuses in Rwandan War, New York, January 1994, p. 20-22.*

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enacting national penalties, parties may call upon the competent organs of the United Nations to "take such action under the Charter of the United Nations as they consider appropriate for the suppression" of such acts. For example, the ICTR should be empowered to fine juristic persons having played a role, directly or indirectly, in the genocide and other crimes against humanity. This money would be affected to national reconstruction of Rwanda and to compensate victims of the atrocities in the form of 'class claims': victims with similar situation[1426] would be grouped and part of the money would be affected to their common benefit.[1427]

The foregoing analysis has shown that important basic tensions exist within the mandate of the ICTR. On one hand, it has to ensure individual responsibility and deal with the problem of "the culture of impunity". On the other hand, there is a more basic requirement, namely to ensure reconciliation and to "reconstruct" the Rwandan society and State. Whether these aims are fully compatible is doubtful, at least if one is to consider the way they have been pursued by both the ICTR and Rwandan domestic courts. Indications have been that the tension has not yet been resolved. It has rather been exacerbated by the demonisation of Hutus by the international community and the Tutsi government. The elimination of the bias in the UN legislation and practice would be one of the solutions to the Hutu-Tutsi problem.

3.9 The challenge of reconciliation and reconstruction

After the genocide in 1994, some analysts have suggested the partition of the country into Hutuland and Tutsiland as a solution for long-term peace.[1428] In this section, the author shows that this idea is based on a poor analysis of the country and its history. It is argued that what is needed is national reconciliation and construction of a peaceful society and a viable State. However, as Rwanda stands like a tree of which balance is precarious because its roots have been eaten into by insects, reconciliation requires some challenging but healing forces committed to democracy. Indeed, reconciliation means far reaching reconstruction of the State, and far reaching new formulae on how power is exercised, how the resources of the State have to be used, how they have to be distributed, how jobs are offered, how education is going to be given to the people. The failure of the Rwandan State to solve those problems pertains to the failure of democracy. And democracy has failed

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[1426] For example, widows, orphans, etc.

[1427] Avocats Sans Frontières, Lettre Ouverte, June 1995.

[1428] See Mazrui, A., 'United States of Central Africa' in The Monitor, December 5, 1996; Moi, A., 'Hutus versus Tutsis' in The New Vision, December 14, 1997; Griggs R., The Great Lakes Conflict: Strategies for Building long-term Peace, Center for World Indigenous Studies, 4, World Atlas, 1997.

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because of its misinterpretation by political actors who have been using the State itself to tyrannise, thus holding the reconciliation process in check. The fundamental reason for the failure of the Arusha Peace Accord particularly has been the suspicion between both parties which showed itself through the search by both blocs to at all costs achieve ability of the majority to impose its will through government. Hutus wanted to translate their will into law just because they are the majority, while Tutsis hold on to power because of their traditional role in the society and their fear of oppression through the application of majoritarianism. In this regard, the central problem Rwanda has been facing pertains to the mistaken belief that majorities have an inherent right to rule and the myth that Rwanda can have a democratic system based on majority rule that is not ethnic as well. As both Hutus and Tutsis have fallen into the traps laid by the attractive, but dangerous, myths of majoritarianism, this dissertation proposes an alternative understanding of democracy, its application to and implications for Rwanda. This, together with other proposals contained in this dissertation, would be the main sources of lasting peace and respect for human rights in Rwanda, mainly since most of these proposals offer a legitimate rationale for limiting majority will. The impact of the African Charter on Human and Peoples' Rights on the protection of human rights in Africa is also assessed.

3.9.1 The Hutuland and Tutsiland formula

The idea of partitioning Rwanda into Hutu and Tutsi zones was once suggested by *Rutsindura* in his analysis of power in Rwanda.[1429] It was then supported by President *Bagaza* in Burundi while considering the problem in the two countries, but he soon retracted the idea under public pressure.[1430] Today, it is hard to find a Hutu or Tutsi who supports this idea. It has had some appeal among extra-regional actors. *Herman J. Cohen*, Senior Associate at the Centre for Strategic and International Studies and former US ambassador, for example, suggested this idea in 1996 in an interview on the Cable News Network.[1431]

The chief problem of the partition is that it would be nearly impossible to operationalise. First, segregation within Rwanda [and Burundi] is a very local matter: either by rural hillside community or by rural/urban division [more Tutsis in the cities]. As far as land is concerned, the fertility is not evenly distributed, it is not clear who would move to *Kibuye* or *Gikongoro* where almost nothing grows, nor who would leave *Bugesera* or *Mutara* or *Ruhengeri* where the land is fertile. Second,

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[1429] See Rutsindura, K., 'Partition as a Way of Restoring and Maintaining Peace in Rwanda', Working Paper, Nairobi, June 1997.

[1430] Griggs, The Great Lakes Conflict: Strategies for Building long-term Peace, 1997.

[1431] CNN, cited in Griggs, The Great Lakes Conflict: Strategies for Building long-term Peace, 1997.

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there is widespread intermarriage and an overwhelming 85-90% Hutu majority. Thus, who would move where would be as deep a political crisis as the current one. To which side would mixed people go? Third, the mass movement of people could be destabilising, as was the case in India and Pakistan in 1948.[1432] Thus, partition would be no solution since "separating fighters has never permitted to bring peace".[1433]The result might be continued violence, as people would always be looking forward to regaining their lost better place. The violence would also be in the form of State to State war as far as Rwanda and Burundi are concerned.

3.9.2 National reconciliation

The discussion in various parts of this dissertation revealed that the Rwandan society has not been peaceful and that the stability of the State has been in jeopardy. The first step in any solution obviously is in negotiating. As human rights do not apply in a vacuum but in a viable State, the prerequisite in Rwanda is to tackle the factors of tension and disintegration which have led to the 1990s catastrophe, so as to build a peaceful, harmonious and reconciled society. In this regard, it is in the interest of Hutus and Tutsis to negotiate a lasting solution and for any solution to be transparent, and appeal directly to affected people or it will lack legitimacy. Secret negotiations among elite actors are unlikely to eliminate the structural factors and discursive practices that foment conflict. Delegations to Arusha in 1992-3 comprised only a political elite and their efforts ended in genocide, ethnic massacres, and confiscation of power - not entirely surprising since it included only the groups with a history and interest in exploiting ethnicity. Thus, negotiations must recognise all concerned actors including Hutu and Tutsi intellectuals, civil servants, businessmen, refugees, and other members of civil society, many of whom have been united against violence but consistently ignored because they lack a militia.

3.9.2.1 The prerequisite for reconciliation

The comparison of Rwanda with South Africa shows that there is a long way to go for reconciliation and reconstruction to come into being in Rwanda. While the apartheid State in South Africa was weakened from within by officials and elected representatives who engaged in actions beyond the limits set by the laws of the State, the Tutsi State has been strengthened by the elimination of

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[1432] Griggs, The Great Lakes Conflict: Strategies for Building long-term Peace, 1997.

[1433] See Jean Pierre Gontard, cited in Nsengiyaremye, The unknown tragedy, at 119. As regards the grouping of Hutus and Tutsis into two distinct states of Rwanda and Burundi, Jean Claude Chrétien observes that it "would ratify ethnic purification and snaps fingers at the history of the region. *Le Soir*, 12 December 1994.

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'troublesome' elements who would have the courage to point out the wrongdoings of the ruling class. Corruption – the use of public funds in contravention of the laws of the State itself – was a widespread phenomenon in South Africa. Most widely known was the scandal about the use of secret funds by the then Department of Information, which led to the resignation of the State President, *B.J. Vorster*, in 1978.[1434] During the course of 1980s allegations of the misuse of public funds in the course of the subordinate 'homelands' of *Transkei, Ciskei, Kwa-Ndebele* and *Lebowa* became the subject of official Commissions of Inquiry, with the allegations being confirmed in the latter two cases.[1435] Such commissions are not instituted in Rwanda despite evidence of corruption and embezzlement.[1436]

Dirty tricks by a State, in the form of illegal actions against the political opposition, are not easily verifiable. However, circumstantial evidence pointing to such actions by the South African State is not hard to find. Most infamous are deaths in detention of political prisoners, with the death of Black consciousness leader, *Steve Biko*, in 1977 being the most notorious. According to one source, sixty-eight such deaths occurred from September 1963 to August 1988.[1437] Illegal actions by the security forces in the form of 'death squads' have persisted into the 1990s, but an official inquiry, as well as a Standing Commission of the National Peace Accord, could not find evidence of such operations.[1438] The most well substantiated action of this kind by members of the State in their personal capacities thus far was revealed in the so-called Trust Feed murder case. A police officer was found guilty on eleven counts of murder after admitting to executing an attack on a United Democratic Front (UDF) stronghold in 1988.[1439] Less violent, but still in the realm of dirty tricks, was the admission of the government to the clandestine funding of the *Inkatha* Freedom Party in 1991.[1440] Many people die in detention places in Rwanda and, in fact, as explained in earlier discussion, there is no political prisoner in that country, at least in the South African sense, since almost anyone involved in politics

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[1434] Davenport, R.R.H., South Africa – A Modern History, Johannesburg: Macmillan, 3 ed., 1987, p. 435-437; Loraine Gordon (ed.), Survey of Race Relations in South Africa 1979, Johannesburg: South African Institute of Race Relations, 1980, p. 7-9.

[1435] Cooper et al., Race Relations Survey 1989/90, p. 74-84; 125, 130; Cooper et al., Race Relations Survey 1989/1990, p., 484, 503, 512, 518; Carole Cooper *et al.*, Race Relations survey 1992/93, Johannesburg: South African Institute of Race Relations, 1993, p. 26, 33.

[1436] Read for example Nkundiyaremye, A., Note sur la situation socio-politique du Rwanda actuel – Le bilan catastrophique de 5 ans du regime FPR, unpublished paper, Brussels, May 1999.

[1437] Cooper *et al.*, *Race Relations Survey 1988/89*, p. 554.

[1438] Cooper *et al.*, *Race Relations Survey 1991/92,* Johannesburg: South African Institute of Race Relations, 1992, p. 492-494*;* Cooper *et al.*, *Race Relations Survey 1992/93,* p. 27, 28.

[1439] Coombe, D., '"Of Murder and Deceit": The Trust Feed Killings'

[1440] Cooper *et al.*, *Race Relations Survey 1991/92*, p. 483, 484.

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during the *Habyarimana* regime is considered as '*génocidaire*' by the ruling RPF. However, a number of prisoners were arrested simply because of their ethnic affiliation. Therefore, the RPF government does not seem to have any significant threat from within, apart from a handful of Tutsis opponents, supporters of the restoration Tutsi kingship in Rwanda.[1441] As this is a Tutsi-Tutsi affair, it would change nothing in the Hutu-Tutsi socio-political problem.

From outside, the South African State was weakened by a number of forms of resistance. Organized civil disobedience took the form of the 1989 Defiance Campaign, targeting segregated hospitals, beaches and buses.[1442] Far more extensive was the gradual but persistent unorganized civil disobedience of thousands of ordinary Black South Africans who simply stopped following the apartheid prescriptions in an attempt to devise workable survival strategies for themselves. Civil disobedience of this order served to accelerate the collapse of urban and communal apartheid, as much as organised resistance did.[1443] It also stimulated the rapid growth of a parallel economy, operating beyond the control of the State. According to one estimate released in 1992, up to 3.5 million people, out of an economically active population of 14.3 million, were employed within this informal sector of the economy.[1444] Because of the tight vigilance of the RPF and the resultant killing of any recalcitrant, civil disobedience is not easy to practise in Rwanda at the present time. Under the pretext of "local defense", the RPF has organized a militia with mission to control every daily activity of Hutus or their Tutsi relatives in all quarters of the country. For each of the 10,000 cells (administrative unity of about 150 families each) that are numbered in Rwanda, five militiamen, well-trained and armed with guns, have been appointed. This makes in total over 50,000 militias called *Inyangamugayo*[1445] who, if needs be, can eliminate any element judged dangerous for the RPF survival.[1446]

[1441] Some sources affirm that King Kigeri V, defected in 1959 and in exile in the USA, is contesting the Republic and would like to return to Rwanda and restore the kingship. See for example, Matata, J., Le Retour à la Royauté, Brussels, March 1999.

[1442] Cooper *et al.*, *Race Relations Survey 1989/90*, p. 222-227.

[1443] Kane-Berman, J., *South Africa's Silent Revolution*, Johannesburg: South African Institute of Race Relations &Southern, 2nd ed. 1991, p. 25-58.

[1444] Cooper et al., *Race Relations Survey 1992/93*, p. 110. An in-depth analysis of this sector of the economy can be found in Eleanor Preston-Whyte and Christian Rogerson (eds.), *South Africa's Informal Economy*, Cape Town: Oxford University Press, 1991.

[1445] Can be compared to *Interahamwe* of MRND.

[1446] Nkundiyaremye, A., Note sur la situation socio-politique du Rwanda actuel – Le bilan catastrophique de 5 ans du regime FPR, unpublished paper, Brussels, May 1999. From the abroad, however, the *Rassemblement pour le Retour des Réfugiés et la Démocratie au Rwanda* strives to challenge the RPF. The RDR is a political organisation, whose aim is to struggle for a rule of law, justice, democracy, republican values and to establish the whole truth about the Rwandan tragedy. These are undoubtedly the corner stone to true reconciliation, long-lasting peace and sustainable development.

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The toleration of private armies and paramilitary forces which challenge the claims to State sovereignty also indicates a weakening of State power. With the un-banning of the Pan Africanist Congress (PAC) and African National Congress (ANC) in South Africa in 1990, neither disbanded their military wings, the Azanian People's Liberation Army (APLA) and *Umkhonto we Sizwe* (MK), respectively. The ANC did suspend the armed struggle in 1990, but refused to reveal its arms caches, while the PAC continued its armed campaign, despite its newly acquired legalised status. The ANC announced in December in 1990 that so-called 'people's defense committees' would be established in black townships to ensure the physical safety of residents. The white right-wing *Afrikaner Weerstandsbeweging* (AWB) followed suit in early 1991 by establishing a new military wing, the *Ystergarde* (Guards of Steel), to be recruited from the ranks of former defense force and police personnel.[1447] The National Peace Accord, signed in September 1991 by the National Party (NP), ANC, South African Communist Party (SACP) and *Inkata* Freedom Party (IFP), but not by the AWB and PAC, explicitly prohibits the maintenance of private armies,[1448] but by early 1994 had not yet been effective in the disbanding of any one of these units. Such a situation does not seem to prevail in Rwanda where the only *Peuple en Armes pour la Libération du Rwanda* (PALIR) organized by Hutus in the DRC has been dismantled by the Tutsi army in its invasion and occupation of eastern Congo.[1449] Besides, in order to attract international sympathy, the RPF is hiding behind the 1994 genocide, trying to find false or true evidence against potential political challengers, thus hindering any opposition initiative in and outside Rwanda. Under such conditions, it would take a very long time for PALIR and other armed opposition to organize, to get international credibility, and indeed make a strong challenging element.

Another crucial challenge to the State in South Africa was in the form of so-called 'people's courts', erected as a set of institutions to enact informal justice within the black townships. These were not merely bodies running parallel and complementary to the formal judicial system of the State, as were some of the earlier informal township courts. The courts established by UDF affiliates were parallel and antagonistic to the State, '...part of a broad national movement that sought to transform the

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The RDR reiterates the need of a rule of law and a society managed without any kind of exclusion, based on freedom, justice and peace and respecting the Universal Declaration of Human Rights. It condemns the Tutsi genocide and the genocide perpetrated against Hutus.

[1447] Cooper et al., *Race Relations Survey 1991/92*, p. 484.

[1448] Section 3.7, par. 3.7.3.

[1449] The only pretext put forward by the RPF for the invasion was that the PALIR was formed and composed of elements of the former Rwandan army involved in the genocide.

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State itself',[1450] through '...a deliberate effort to replace the organs of the State and in so doing transform political relationships'.[1451] The State recognized this challenge and with some measure of success sought to suppress the continued existence of these courts, which during 1985 were estimated to number more than 400.[1452] In Rwanda, instead, the government is setting up the *gacaca* (extra-judicial tribunals) with competence to prosecute, judge and punish those Hutus that have not been 'punished' in the formal judicial system. Certain analysts point out that these tribunals have been thought up in order to counteract any political opposition initiative, like the 'people's courts of South Africa', to challenge the RPF.[1453] They will certainly make use of the *Inyangamugayo* militia for investigation and arrests.

The most tangible success of the insurrectionary project against the South African State, and the most visible indicator of the weakening of the State, was the extent to which the State structures of Black Local Authorities (BLAs) collapsed. These bodies, set up to administer African townships, were constituted with elected councils; elections were held in 1983 and 1988. The councilors became a prime focus for attack by the UDF/ANC allied township organizations, and there was sustained hostility towards the persons and institutions of the BLAs. The 1988 elections were countered with a boycott so successful that only a 25.1 percent official turnout was registered.[1454] Individual councilors and their property were subjected to physical attacks, with 111 such attacks being recorded in the first half of 1990.[1455] Coupled to the campaign by CAST (Civic Associations of the Southern Transval) to bring about the collapse of these bodies, large numbers of councilors resigned. By the end of 1990, 40 percent of BLAs had ceased functioning, and by March 1991 the number had risen to 48 percent.[1456] The masquerade of the local authorities' election organized in Rwanda in March 1999 went unchallenged. Candidates were presented by political and military authorities at the very

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[1450] Seekings, J., 'People's Courts and Popular Politics', in Glenn Moss and Ingrid Obery (eds.), *South African Review 5,* Johannesburg: Ravan, 1989, p. 119-135 at 132.

[1451] Lodge, T., 'Ideology and People's Power', in Lodge et al., *All, Here and Now,* p. 127-140 at 135.

[1452] Seekings, 'People's Courts and Popular Politics', p. 123. For general analyses of these structures, see Sandra Burman, 'The role of street committees: continuing South Africa's practice of alternative justice', in Hugh Corder (ed.), *Democracy and the Judiciary*, Cape Town: Institute for a Democratic Alternative for South Africa, 1988, p. 141-166; Sandra Burman and Wilfried Scharf, 'Creating People's Justice: Street Committees and People's Courts in a South African City', *Law and Society Review*, vol. 24, no. 3, 1990, p. 693-744; Wilfried Scharf, 'The role of people's courts in transitions', in Hugh Corder (ed.), *Democracy and the Judiciary*, Cape Town: Institute for a Democratic Alternative for South Africa, 1988, p. 167-184.

[1453] See for example Nkundiyaremye, Note sur la situation socio-politique du Rwanda actuel, p. 6.

[1454] Cooper et al., *Race Relations Survey 1988/89,* p. 512.

[1455] Cooper et al., *Race Relations Survey 1991/92,* p. 490.

[1456] Anthea Jeffrey (ed.), *Forum on Mass Mobilization,* Johannesburg: South African Institute of Race Relations, 1991, p. 11.

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time of the vote, and voters were requested to queue behind the candidate.[1457] Some of the politicians interviewed responded that "we still need to live for sometime and cannot dare to point out the rampant injustice in this country"[1458] and the international community remained silent.

In making an overall assessment of how weak the South African State had become by the early 1990s, one has to consider the extent to which insurrectionary goals and counterrevolutionary targets failed to be achieved on both sides. The ANC was successful in its military campaign as 'armed propaganda', but failed to achieve a generalised insurrection.[1459] Nor were liberated zones established or dual sovereignty achieved on a more or less permanent basis.[1460] The State was strong enough to protect its core interests and institutions against the insurrectionists,[1461] but little more "although security action weakened the extra-parliamentary opposition and welfare action won the hearts and minds of a small number of blacks, this low-intensity conflict phase of total strategy succeeded in managing rather than destroying political opposition".[1462]

Perhaps time can teach us many on the Rwandan situation. Will it remain as it is now? Will the RPF be able to keep its minority rule? It is possible that Hutus in exile will not remain silent. Political organizations are being created and are trying to demand support from the international community "for reconciliation" and reconstruction in their country.[1463]

In South Africa, a mutually hurting stalemate set in. The resilience of the State in meeting the challenges was ascribed to its capacity for innovation, as well as to the modification and adaptation of apartheid institutions to changing conditions of adversity.[1464] However, the inability of the State to

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[1457] Nkundiyaremye, Note sur la situation socio-politique du Rwanda actuel, p. 2.

[1458] Interview with Nkeramugaba, Member of Parliament. This mode of ballot was illegal: absence of legal provision on election, non-participation of political parties, absence of secret of vote; absence of a law on election of and by foreigners, absence of the right of appeal or any other challenge of irregularity, and negation of the role of the *Conseil d'Etat.*

[1459] Lodge, T., 'The African National Congress in south Africa, 1976-1983: guerrilla War and Armed Propaganda', *Journal of Contemporary African Studies*, vol. 3, no. 12, 1983/84, p. 153-180; Lodge, T., 'The African National Congress in the 1990s', in Moss and Obery (eds.), *South African Review 6*, p. 45.

[1460] Maylam, P., 'The Rise and Decline of Urban Apartheid in South Africa', *African Affairs*, vol. 89, no, 354, 1990, p. 57-84 at 81.

[1461] Sarakinsky, I., 'State, Strategy and Extra-Parliamentary Opposition in South Africa 1983-1988', *Politikon,* vol. 16, no. 1, June 1989, p. 69-82.

[1462] Hansson, 'Changes in counter-revolutionary state strategy in the decade 1979 to 1989', in Hansson and Smit (eds.), *Towards Justice*, p. 55. Original emphasis

[1463] See for example RDR, Plateforme Idéologique du Rassemblement pour le Retour des Refugiés et la Démocratie au Rwanda, Paris, 23 August 1998, FRD, Communiqué de Presse, Nos. 3, 5, 6, 8, 11, and 13.

[1464] There is a sound body of literature arguing this line. Foremost is certainly the early analysis of Herbert Adam, *Modernizing Racial Modernization – The Dynamics of South African Politics*, Berkeley: University of California Press,

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maintain its almost omnipotent position of the late 1960s was accounted for by a combination of manpower shortages, declining resources,[1465] and weakening resolve.[1466] The RPF seems to maintain its position since it has succeeded to gain international support, using the genocide as a trump card to hinder every political initiative from Hutus.

The fact remains that the mechanics of reconstruction and reconciliation are not matters of emotion: Rwandan people will not go to sleep to wake up the following day liking each other. They will only trust secure deals at a certain point and the process will probably be extended in the future. In South Africa, reconciliation and reconstruction of the State did happen because the war was dragged out to the point of mutual exhaustion. It was also due to the change of the international cold war paradigm and the relatively smooth transition to majority rule in Namibia. There is no convincing framework in the region of east and central Africa that can influence the Rwandans to initiate the settlement of their problem. Today, the situation for people in Burundi, the eastern region of the DRC and in Rwanda is quite severe and it is receiving minimal media attention and insufficient humanitarian aid. First, in the rural areas much of the population now live in government 'regrouping camps' of five to fifteen thousand people, some of which rely entirely on humanitarian aid. The extent of this is unknown but based on recent interviews conducted by the author, two million people at the very minnimum live in this manner.[1467] They are unable to reach their farms and those that do may be shot by the army because anyone found outside a regrouping camp in certain areas, is assumed to be a rebel. In these camps people are malnourished and - with luck - eat one meal a day. They do not have enough water to drink, let alone maintain sanitary conditions. They need clothes, blankets, mats to sleep on, and food. They also desperately need some monitoring because no one is focusing on these conditions. The UN does some monitoring only in areas close to major cities. The few people who can get to the interior areas - where there are roadblocks and clearances are required - report appalling conditions, with people subjected to massacres by both rebels and the army.[1468] Hundreds of women and children are dying every month, but outside of a few reports

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[1465] These two sets of factors are highlighted by Merle Lipton and Charles Simkins, 'Introduction', in Merle Lipton and Charles Simkins (eds.), *State & Market in Post-Apartheid South Africa*, Johannesburg: Witwatersrand University Press, 1993, p. 1-34 at 9-13.

[1466] The weakening resolve can be traced back to the decline of intellectual support for apartheid from within Afrikaner ranks, as noted by Hermann Giliomee and Lawrence Schlemmer in *From Apartheid to Nation-building*, p. 59, 120.

[1467] In addition to the letters received from Rwanda, Burundi, and the DRC, the author has interviewed different refugees from those countries [Burundi (8), the DRC (13), and Rwanda (6)] as well as journalists who visited some of the different regions of those countries (Jean Moussart of Reporters Sans Frontières, Stan Tossou of Channel Africa, and Joseph Mumtaz of SABC).

[1468] Jean Moussart, 12 March 1999; Stan Tossou, 21 March 1999.

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usually picked up on the wireless services, there is no sustained investigative reporting to reveal who is doing the killing. The rebels blame government soldiers and the government blames the rebels. Tutsi and Hutu journalists follow suit-distorting stories in terms of their own particular political and ethnic persuasions. After the genocide in 1994 many analysts suggested that the lack of media attention in the months prior to the killings contributed to international indifference and inaction. For months, vitriolic hate messages were pumped out over the State-owned radio (Radio Rwanda), Radio *Muhabura*, and the print media, but very few journalists chose to cover that story. Later, when journalists covered the refugee camps in *Goma*, it refocused international attention and the world community responded to the plight of the refugees.[1469]

A third reason to pay attention to Burundi and Rwanda is that there still is a potential of a conflagration in this area that could involve a large number of States. *Kabila*'s drive toward *Kinshasa* has been the beginning rather than the end of troubles because of the political alignments in the region. Indeed, he has failed to stabilize the DRC within the region and the country has collapsed into fighting among various movements. The reverberations are felt all across Africa in the form of refugee movement, large-scale war, and newly inspired moves for self-determination. New international alignments, a reconsideration of African boundaries,[1470] massive refugee movements, destabilization in ten neighboring countries, and neo-colonialist forms of economic occupation are all potential aspects of a new African portrait that could follow on the heels of the DRC's present unstable position at the heart of the continent.

Part of understanding either the stability or instability of the DRC depends on understanding Rwanda and Burundi. The current war in the DRC is clearly linked to instability there. The crisis of ex-Rwandan and ex-Burundian soldiers who used refugees as human shields and launched cross-border raids into Rwanda and Burundi in the past years was compounded by terrible policy errors on the part of the then Zaire. In late September 1996, the governor of Zaire's *Kivu* Province asked that the so-called *Banyamulenge* or ethnic Tutsis of the *Mulenge* Mountain in Eastern Zaire "return to Rwanda" despite at least two centuries of ancestry in Zaire.[1471] The Zairian governor's order of ethnic expulsion was ill-timed, poorly informed and deplorably bad strategy. It led to the immediate military mobilization of the *Banyamulenge*, provided Rwanda and Uganda with allied forces that

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[1469] See Amnesty International, Annual Report, 1996.

[1470] Read Speech of the Rwandan President, 15 April 1998. According to him, African boundaries should be reviewed because "they do not correspond to the current situation".

[1471] For details about the Banyamulenge, see Mulaba, A., Tribes in Zaire, Bukavu: Alfajiri, 1997.

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could stop cross-border incursions from opposition militias with limited direct involvement, and it allowed *Laurent Kabila* and other anti-*Mobutu* forces an opportunity to piggy-back this into a revolution. In just eight months this group of allied militias that included many Tutsis occupied one-third of this huge central African country.[1472]

A geopolitical understanding that is fundamental to any effort to bring long-term stability to this region is to understand that the ethnic distribution of Hutus and Tutsis is not confined within political boundaries. Of some thirteen million people within the two States, over 85% are Hutus and about 14% Tutsis.[1473] However, two million of an estimated fifteen million Hutus and Tutsis are located across the boundaries of Rwanda and Burundi in neighbouring States. Some 400,000 Tutsis [and some Hutus] trace their ancestry to either eastern DRC's North *Kivu* province [the *'Banyarwanda'*] or its South *Kivu* province [the Tutsis]. Between 750,000 and one million Hutus are located on the Tanzanian boundary with Rwanda and Burundi. Tens of thousands of both Tutsis and Hutus reside along the Rwanda/Uganda boundary in the *Kisoro* sub-district. Ethnic ties have created alliances such as the particularly strong one between President *Museveni* of Uganda whose revolutionary movement included many Tutsis, the minority Tutsi regimes in Rwanda and Burundi, and *Kabila*'s forces. The Hutus have had the sympathies of other neighbouring States such as Tanzania, Kenya, and even Sudan. In fact, most of the region is aligned in the Hutu/Tutsi conflict in a delicate yet explosive web of alliances. At the beginning of the war in the DRC, Uganda, Rwanda, Burundi and *Kabila* were in one camp allied with the Tutsis, while Tanzania, Kenya, *Mobutu*'s Zaire, and Sudan formed a camp more aligned with the Hutus. Now *Kabila* has switched side to the Hutus, following the Tutsis' attempts to overthrow him. The possibility exists that the fighting in Sudan could become interlinked with fighting in the Great Lakes region. To some degree, that process has begun. Sudan already supports rebel movements inside the DRC that launch attacks into Uganda.[1474]

Consider another scenario. The minority Tutsi regimes in Rwanda and Burundi, both of which are unstable, are now fighting to seize power in the DRC, or at least in the eastern part of that country with the support of Uganda. Imagine that they succeed and that there is a shift to democratic rule in Burundi and the Hutus come to power thereafter, pushing the Tutsis aside. There would be a mutual deep hostility between these countries that would manifest itself in covert military aid to warring militias in a new civil war or even direct military action.

[1472] Mulaba, Tribe in Zaire, p. 21.

[1473] Griggs, Geostrategies in the Great Lakes Region, p. 6.

[1474] Lord's Resistance Army, West Nile Liberation Army.

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A third scenario is that Tanzania invades Burundi in order to restore a Hutu democracy. Tanzania has been offering direct support to Hutu rebels in terms of training bases and a location from which to start cross-border raids. It has deep ties with Hutu leaders, many of whom serve and have influence in Tanzania's army. That could also see this region explode into conflagration because of existing alliances and this fact does not inspire Rwandan people to negotiate, though that seems to be the only way forward through the crisis in the country. The UN five-point peace plan has the merit of cease-fire and negotiations and there is little to criticize with regard to international diplomatic efforts. However, some warnings about the evolution of these negotiations must be offered. At some point negotiations must be regional or they will fail because of the complex alliances already described in addition to a vast number of other issues related to cross-boundary social, political, economic, and physical linkages requiring regional consideration. On the other hand, however, the Rwandan crisis, in the first place, concerns Rwandan people, and can only be solved by them. It does not depend on the solution of the crisis in the DRC or Burundi. It can rather be catalystic for the solution of crises in those and other countries of the region. A truth and reconciliation process could be one of the major steps to reach the solution.

3.9.2.2 The need for truth and reconciliation doctrine

Since 1994, justice in Rwanda has become a topical theme, as well as one of research and international politics and co-operation. Governments, development agencies, the press and academic institutions, have invested considerable human and financial resources in this domain. This investment sought to respond to the important challenge posed by the genocide and crimes against humanity which took place in Rwanda in 1994: how can justice be rendered to the victims of these crimes and to the Rwandan society itself, and, at the same time, contribute to the creation of a context which is conducive to sustainable human development?[1475] The expectations imposed on the Rwandan judicial system and the International Criminal Tribunal for Rwanda (ICTR) were, and still are, enormous. This section seeks to examine whether and how an alternative non-judicial approach could complement the individual judicial procedures that are currently applied before the courts and tribunals[1476].

[1475] See, for example: Government Of Rwanda, *Rwanda Round Table Conference - Medium-Term Policy Framework Document (1996 - 1998)*, Geneva, June 1996, p.43.

[1476] This will be limited to the initiatives at the level of the State, leaving aside the traditional reconciliation mechanisms, which, at the local level, could play an extremely important role outside of the context of public administration and national politics.

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3.9.2.2.1 An overview of the judicial approach

As of early April 1999, some 501 persons have been convicted or acquitted by the Specialised Chambers of the *Tribunaux de Première Instance* in Rwanda. The ICTR passed two verdicts[1477]. Other national jurisdictions, whose competence regarding acts of genocide ensues from the principle of universal jurisdiction, have neither convicted nor acquitted anyone[1478]. Some 150,000 persons are held in prisons or other places of detention in Rwanda[1479]; the large majority of them is accused of acts of genocide or other crimes against humanity committed during the months of April, May and June 1994. Tens of thousands of Rwandans are still outside the country[1480]. Although the impact of their possible return and this new diaspora on the prison population[1481] is hard to assess, their return, according to some estimates[1482] (in addition to the arrests of previous returnees and others) could raise the number of the detained to some 200,000 persons. No judicial system, whether in Rwanda or in a so-called "developed" country, has the capacity to judge such a high number of persons within an acceptable time frame[1483].

[1477] Jean Kambanda, former Prime Minister, and Jean Paul Akayesu, former burgomaster of Taba commune, have been sentenced to life imprisonment. In his report to the Security Council on June 4, 1995, the Secretary-General of the UN had announced that the investigations by the Prosecutor's office of the ICTR would cover 400 suspects who had been properly identified. In reality, to date, 35 persons have been indicted. (UN Security CounciL, *Report of the Secretary-General on the United Nations Assistance Mission for Rwanda*, S/1995/457, 4 June 1995, par. 30).

[1478] Fully aware of the primacy of the ICTR, the Special Rapporteur of the UN Commission for Human Rights, Mr. Degni-Ségui, had nevertheless hoped that the ICTR would not be the only institution to prosecute the «*big criminals*» who were outside Rwanda's territory. (COMMISSION DES DROITS DE L'HOMME, *Rapport sur la situation des droits de l'homme au Rwanda soumis par le Rapporteur spécial, M. René Degni-Ségui, en application du paragraphe 20 de la résolution S-3/1 du 25 mai 1994*, E/CN.4/1996/7, 28 juin 1995, p. 50).

[1479] The latest report of the UNHCHR on the HRFOR includes figures, as of 31 December 1997, of 77,349 for central prisons and around 48,863 for other detention centres (excluding military and sector-level civilian lock-ups). This adds up to 126,212 detainees (UN COMMISSION ON HUMAN RIGHTS, *Human Rights Field Operation in Rwanda. Report of the United Nations High Commissioner for Human Rights*, E/CN.4/1998/61, 19 February 1998, p. 7).

[1480] Some reports suggest that approximately 75,000 Rwandan refugees are scattered throughout the region (XINHUA, UNHCR *ends three-day visit to Rwanda*, 17 February 1998). Nkundiyaremye *(Note sur la situation socio-politique du Rwanda actuel, p. 10);* and the *Centre de Lutte Contre l'Injustice et l'Impunité au Rwanda* (*Communiqué No. 47, May 1999)*, indicate many other detention areas, including private homes, and estimate the total of detainees at 150,000 people.

[1481] In January 1998, the president of the Commission for the Repatriation and Reintegration of Refugees declared that "*the Government of Rwanda is seeking, by all possible means, to ensure that these persons, whether innocent or not, return home"* (AFP, 27 January 1998) (Translated by Steff Vandeginste in *The Reconciliation Approach to the Genocide and Crime Against Humanity in Rwanda,* Centre for Studies on the Great Lakes Region, University of Antwerpen, May 1998).

[1482] Stiftung Wissenschaft Und Politik, *Improving African and International Capabilities for Preventing and Resolving Violent Conflict. The Great Lakes Region Crisis*, Berlin, July 1997, p.17. The document even refers to an estimate by the Government of Rwanda: "*The Rwandan government has a projected figure of 200,000 persons subject to imprisonment".* (p.98).

[1483] Numerous calculations have been made to estimate the number of years needed to bring all detainees to trial at the present rate of progress. See, for example, Currin, B., "Southern African Catholic Bishops' Conference Delegation to Rwanda" in *Justice and Peace Annual Report*, 1997, p.32: "*It could take up to 500 years to process all the cases".*

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Nevertheless, the Rwandan government sought to organise the prosecution of acts of genocide and crimes against humanity which had destroyed the country along the lines of individual trials of each suspected genocide perpetrator. The international community supported it, in this way to meet its stated objective, which consists of putting an end to a culture of impunity that had reigned for too long in the country. Several donors even took the first steps in this area of co-operation for rehabilitation of a judicial system and promotion of the rule of law: court buildings have been rehabilitated, legal personnel have been trained, although for a short period, and institutional support has been provided to the Ministry of Justice and the judiciary. The aim of all these interventions was, above all[1484], to contribute to the trial of genocide suspects by the Rwandan justice system[1485]. During all of 1996, diplomats and other representatives of the international community continuously insisted that the Organic Law of 30 August 1996 on the organisation of prosecutions for offences constituting the crime of genocide or crimes against humanity committed since 1 October 1990, be published as quickly as possible in the Official Gazette "so that trials may start"[1486]. This was considered by donors as an essential and indispensable instrument for establishing the truth and for promoting reconciliation. Several human rights organisations have, for a long time, insisted on what the Rwandan government is trying to achieve, namely, identifying and prosecuting those responsible for human rights violations, which is indispensable for rendering justice to victims, their families and to the society as a whole. The strategy in itself can therefore be legitimate and justified.

Several elements may help explain why, to date, this judicial approach based on individual trials has not succeeded in coming to terms with the past.

Firstly, there is the magnitude of the problem. The number and intensity of the crimes committed is enormous. As a result, the number of potential suspects to be brought before the Rwandan justice system is extremely high. Arrests have continued until today, and consequently, the number of detainees (and, hence, trials) greatly exceeds the one of February 1996, when the above-mentioned

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[1484] Another equally important objective was obviously the long-term rehabilitation of the "normal" judicial system, outside of the context of the trials of suspected perpetrators of genocide. This strategy which aims to combine both objectives was not supported by all the experts in this field; see for example: Schabas, W., *Battling Impunity for Genocide in Underdeveloped States: The Crisis in Rwandan Justice*, ICHRDD Occasional Paper, April 1996, p.3-7.

[1485] See: Vandeginste, S., *Justice for Rwanda and International Cooperation*, Working Paper, University of Antwerp, September 1997.

[1486] As seen, the law came into effect on the day of its publication, 1 September 1996. The first trial hearings actually took place on 27 December 1996.

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draft Organic Law was adopted by the Council of Ministers[1487] and presented to the international community[1488].

Secondly, the capacity of the judicial system was reduced to almost zero. Even if a remarkable effort of reconstruction had been accomplished and the number of human resources (judges, public prosecutor's offices and judicial police inspectors) exceeded the one of the situation prior to April 1994, the capacity of the judicial system is inadequate and will continue to be so, even after new training sessions for legal personnel.

Thirdly, the mechanism provided for under the Organic Law to pass tens of thousands of judgements in a reasonable time frame (without having to resort to expeditious justice) has not worked. The confession and guilty plea procedure[1489] which includes a penalty reduction in case of a confession, has not led to numerous confessions, nor to sufficient evidence to prepare the tens of thousands of case-files[1490] needed. Among the possible reasons why detainees have not confessed in large numbers, one could cite, for example: large numbers of detainees are not guilty or, in any event, consider themselves "innocent", having "simply followed orders"; and the complexity of the procedure entails difficult access to it for detainees.

Finally, trials will face important difficulties contributing to the realisation of the main objective in the medium and long term, namely, the reconciliation of the Rwandan society. Three main problems can be identified within this context: (1) some suspected perpetrators of genocide continue their activities in the form of a rebellion: survivors are threatened and attacked; (2) a large part of the population perceives a lack of representation of the ethnic majority in the new State institutions[1491], including at the level of the judicial system; (3) those responsible for human rights violations committed by the RPA enjoy selective impunity; identifying and prosecuting these persons would constitute the real test of the fight against the impunity of the present regime[1492].

[1487] The draft was adopted on 16 February 1996 (UN Department of Humanitarian Affairs, *Monthly Information Report Rwanda. February 1996*, Geneva, March 1996, p. 17).

[1488] By the end of January 1996, the number of detainees registered by the ICRC stood at about 65,000 persons. (UN Department of Humanitarian Affairs, *Monthly Information Report Rwanda. January 1996*, Geneva, February 1996, p. 14).

[1489] Articles 4 and 5 of the Organic Law of 30 August 1996

[1490] The Human Rights Field Operation estimates that case files formally bringing genocide charges have been opened for around 65 percent of detainees (UN Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights*, E/CN.4/1998/61, 19 February 1998, par. 6).

[1491] For representation of Hutus and Tutsis in State institutions, see Prunier, G., *The Rwanda Crisis*, Columbia University Press, New York, 1997, p. 369.

[1492] Some soldiers of the RPA have in fact been taken before military tribunals. In September 1997, for example, 2

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This overview leads to an inevitable conclusion: the purely judicial approach, be it at the national or international level, cannot solve the problem. Even if the capacity of the judicial system were doubled or tripled, even if tens of thousands of detainees decided to confess[1493], even if case-files were prepared in large numbers, thereby enabling the trials to continue at a faster pace, a complementary non-judicial alternative would be needed. This need is even more pressing, given the conditions to which detainees, including, undoubtedly, thousands of innocent people, are subjected in detention. This observation is by no means new. In this section, the author will try to go beyond the observation and to contribute to a debate that should be placed on the national and international agenda. Other countries have also experienced periods during which massive violations of human rights were seen as a way of capturing and maintaining State power. Numerous studies have been undertaken concerning the way in which countries such as South Africa, El Salvador, Ethiopia, Mozambique, Cambodia, Chile and others have succeeded or failed to come to terms with their past, to establish the *truth* and promote *reconciliation* in their societies. Two of these studies serve as reference theses for this section. Their observations, conclusions and recommendations will be summarised to introduce the notion of a truth and reconciliation approach. Next, an attempt will be made to apply the theory to the Rwandan situation, in order to identify certain opportunities and constraints.

3.9.2.2.2 The truth and reconciliation approach

It is impossible to study the transition process through which the above-mentioned countries have passed or are passing through in detail within the framework of this dissertation. Other authors have examined these in detail. Two of these have been selected here to describe the elements of a truth and reconciliation process, in order to be able to recount what separates the Rwandan situation from other cases and also to contribute to a more in-depth analysis of how common elements from other experiences could be applied in the Rwandan context. Reference will be made to the works of *Daan Bronkhorst*[1494] and *Naomi Roht-Arriaza.*[1495]

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majors and 2 second lieutenants were accused of murder and complicity to murder of some 110 civilians killed during an RPA operation in *Kanama* (in *Gisenyi* prefecture) in September 1995. The Military Tribunal sentenced them for failure to assist persons in danger. It ruled that the massacre was neither ordered nor intentioned by the military system, but was rather the consequence of individual actions of a few soldiers. The court, therefore, did not place responsibility within the command of the RPA (United Nations High Commissioner for Human Rights, The trial of Majors Rwigamba and Ruzibiza and of Second Lieutenants Sano and Rutayisire, RPA Officers, in connection with the 12 September 1995 incident in Kanama commune, UNHRFOR Status Report, 30 October 1997).

[1493] The confession and guilty plea procedure, initially provided for by the Organic Law of 30 August 1996 for 18 months, has been extended by the Presidential Order n° 05/01 of 10/03/1998 to another 18 months from 1 March 1998 onwards. See Journal Officiel, 15 March 1998.

[1494] Bronkhorst, D., Truth and Reconciliation. Obstacles and opportunities for human rights, Amsterdam, Amnesty International Dutch Section, 1995.

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Both authors are aware of the unique character of the experiences of each country, the repression of its people, its history, economic development, old and new political powers, traditional values and legislation.

> "I have been forced to relinquish the hope that from my findings I might be able to distil some model in the process of achieving truth and reconciliation. No one State has closely followed the example of another. ... I believe, however, that it is within the scope of a relatively modest book ... to show how in all this diversity there are certain elements which constantly reappear - and that a few basic patterns can be distinguished".[1496]

Roht-Arriaza notes that countries which face a heritage of human rights violations often take inspiration from the successes and failures of other experiences, while bearing in mind the unique character of their particular situation.

Bronkhorst tries to place the role of justice in the *truth* and *reconciliation* process. The truth helps to shed light on the past. Who are the victims? Who should be held accountable? Reconciliation seeks to heal the society and to help it to come to terms with its past. The place of justice (the identification, prosecution and punishment of perpetrators) in this context seems more controversial. In some countries, justice is, to a large extent, an instrument used to discover the truth. In others, the abdication of justice (i.e. the absence of legal proceedings against suspected perpetrators) is an essential pre-condition for reconciliation. In still other cases, perpetrators are tried and convicted, but then pardoned (and released).

a. Political transition

Generally speaking, truth and reconciliation initiatives are part of a wider framework of political transition to democratic rule. *Bronkhorst* distinguishes three phases of political transition: genesis, transformation and readjustment. The genesis is usually characterised by internal armed conflicts, a repression, an international war, and, in any event, by the extremely limited participation of the population in State affairs. The transformation is marked by efforts towards reconciliation and reconstruction, armed groups forming political parties and rebels becoming government officials. Readjustment could, after some time, lead either to more violence and oppression, or to a more democratic and open society in which human rights, security and democratic participation are respected. In the country in question, this third phase, which forms an integral part of the transition,

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[1495] Roht-Arriaza, N. (ed.), Impunity and Human Rights in International Law and Practice, New York, Oxford University Press, 1995.

[1496] Bronkhorst, D., Truth and Reconciliation, p. 13.

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will eventually have to confront numerous challenges: the heritage of past human rights violations, new forms of violence and insecurity, the massive return of refugees, the lack of a democratic tradition, the frustration of the population faced with limited economic and social benefits after the transition.

Where might one place Rwanda in such a chronology of transition? Firstly, earlier parts of this dissertation showed that the *genesis* criteria have been found in the case of Rwanda since the revolution of 1959 through the war of 1990. Concerning the second phase, the negotiations and the *Arusha* Accords seem, to some extent, to comprise a first attempt at *transformation*, which has unfortunately failed. According to a first thesis, the *Arusha* process had no chance of success from the beginning, and could only lead to a stillbirth. According to another thesis, internal divisions in the unarmed opposition parties, stirred up by events in Burundi at the end of 1993, completely destabilised the tripolar mechanism of Arusha. According to yet another thesis, the Arusha Accords could even have succeeded in the hours following the attack on the presidential plane on 6 April 1994, which was, in reality, the trigger for a genocide which had been planned well before this date. A second attempt at *transformation* and *readjustment* is presently under way: rebels have become political authorities with reconciliation and rehabilitation as stated objectives. Some elements such as the massive return of refugees, the lack of security and economic take-off are also present in the current Rwandan scenario. Concerning the outcome of this process in the Rwandan case, it is undoubtedly too early to pass a final judgement. However, earlier sections have pointed out the continuation of the leadership, hidden behind the façade of an apparently change of regime[1497]. In fact, there seem to be no guarantees that this second attempt at transition will lead to the democratic and open society referred to above.

Truth and reconciliation initiatives are usually found in the second and third phases. In fact, the first attempt at transformation, namely the *Arusha* Accords, included the establishment of an International Commission of Inquiry to investigate human rights violations committed during the war without, however, elaborating mechanisms for judicial proceedings, the compensation of victims, amnesties, etc. This is important because the *Arusha* Accords are part of the current Fundamental Law. The

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[1497] See *Le Tribun du Peuple*, a private newspaper supporting the regime, according to which the "revolution failed because, once we arrived in power, we plagiarised the methods of the government which we were fighting. ... If we look closely, the liabilities of the management of the country by Habyarimana & Co. at the end of the first 15 years of his reign, were largely attained by the new rulers of the country during the past three years". (Mugabe, J.P., "Le FPR s'est abjuré", *Le Tribun du Peuple*, n° 97, August 1997 - text reprinted in *Dialogue*, September-October 1997, p. 87-90) *Translated by Stef Vandeginste, The Reconciliation Approach, 1998. See also* Reyntjens, F., "Rwanda. Evolution politique 1996-1997" in Centre d'étude de la Région des Grands Lacs d'Afrique, *L'Afrique des grands lacs. Annuaire 1996-1997*, Paris, L'Harmattan, p. 51.

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current, second attempt at transition only foresees trials organized on the basis of the Organic Law of 30 August 1996. The preceding section has indicated why a complementary alternative is needed.

Bronkhorst ends his analysis of the different types of transition with the observation that a genesis in the form of a military dictatorship leads more easily to prosecution of perpetrators of human rights violations, than a one party system, where a large part of the population may be considered as being co-responsible for the repression. The latter scenario applies to Rwanda. However, a radical political change (e.g. after a military victory, as was the case in Rwanda) is generally more favourable towards initiatives of justice, truth and reconciliation, than a progressive transition (which was, for example, the scenario under the *Arusha* Accords). Assuming that this analysis also applies to Rwanda, the Rwandan context of political transition seems to present pros and cons for a truth and reconciliation initiative.

b. The conciliation methodology

Although a universal model of a truth and reconciliation process is not available, *Bronkhorst* introduces in his work, as a heuristic instrument, the industrial conciliation model[1498], which comprises 4 elements: investigation, mediation, arbitration or settlement and adjudication. This model is not at all prescriptive, but is, rather, an instrument of analysis, which seems useful to better understand the different components of a truth and reconciliation process.

Investigation includes the inquiry and publication of the facts. Often, a special institution, a truth commission or another institution, is set up by the government or by a parliament to this end. *Bronkhorst* cites numerous examples: Uganda (report published in 1994), Argentina (1984), Chile (1991), Chad (1992), El Salvador (1993)[1499], Sri Lanka (report finished but not published in 1993)[1500], etc. Current circumstances obviously have an enormous impact on the work of such a commission, which, in principle, only examines the past with the aim of building foundations for the future. Thus, in Chad, the author of the report of the Commission of Inquiry into crimes and irregular activities committed by ex-president *Hissen Habré* or his accomplices highlighted that at the time when the inquiries were undertaken, the population was gripped by fear because the actions of the ex-

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[1498] As described in the *Encyclopedia of the Social Sciences* 1968.

[1499] In El Salvador, one week after the publication of the report, the government adopted a presidential proposal granting a general amnesty.

[1500] However, in September 1994, the government of Sri Lanka announced that the reports of the three commissions of inquiry would be published and that trials against those *prima facie* responsible would follow (Amnesty International, *International News*, November 1997, p. 8).

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president's entourage had not yet come to an end. This case presents an interesting precedent for the Rwandan scenario. In other cases such as El Salvador and Guatemala, the establishment of a commission was immediately preceded by a peace accord. Very often other unofficial institutions also conduct parallel inquiries which feed into the work of the official institution: victims' families, local (human rights and other) NGOs, professional lawyers associations, etc. Nevertheless, *Roht-Arriaza* rightly points out that an official *imprimatur* is needed to give authority and credibility to the investigations and their results. The systematic and complete documentation of previous violations is extremely important: it constitutes proof against oblivion; it is at the basis of a collective reminder of events and could help resolve individual complaints submitted. *Bronkhorst* makes reference to the examples of Argentina, Chile, South Africa and the Philippines. To this, one could add the condition that the inquiries should, above all, be reliable, with results that are widely accepted, thereby lending a moral authority, a unique character and a reference value to the investigation conducted.

Mediation comprises all attempts at dialogue between adversaries, possibly under international patronage. Although *Bronkhorst* makes no reference to this, it seems clear that, in order for there to be a dialogue between adversaries, it is necessary, first of all, to identify the adversaries, and, moreover, to clarify their representativeness, which may turn out to be extremely difficult in the Rwandan context. In this context, some key persons can have symbolic value of such weight that they can easily undermine all mediation initiatives. *Bronkhorst* cites the example of the former head of the South African army, *Constand Viljoen*: "He once declared that he "was the man who made the elections possible", which is not entirely an exaggeration: just a week before the elections he openly refused to support an attempted coup d'état which might have been successful".[1501]

Arbitration or settlement comprises efforts to redress violations (by compensating victims, taking disciplinary actions against police officers, soldiers, etc.). The report of the National Commission on Truth and Reconciliation in Chile makes reference to the public rehabilitation of victims (in the form of a monument, a death certificate for persons who disappeared, a lump sum pension and houses for the families), as well as to prevention (in the form of the ratification of international treaties, a publicly accessible database concerning all detentions, human rights education programmes in schools, etc.). At the level of the United Nations, the former Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Theo van Boven*, elaborated "*The Basic Principles and Guidelines on the Right to Reparation for Victims of (Gross) Violations of Human Rights and International Humanitarian Law*", which were submitted to the 53rd session of the Human

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[1501] Bronkhorst, D., Truth and Reconciliation., p. 65.

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Rights Commission in 1997. These stipulate, among other things, that reparation may be claimed by the victims or their relatives, that it should be proportionate to the gravity of the violations to which they were subjected and should include elements of restitution, compensation and rehabilitation, as well as guarantees of non-repetition.[1502] Restitution will help to re-establish the situation prevailing before the violations, including at the level of employment, citizenship and property. Indemnity will cover all assessable damages, including material damage, lost opportunities of education and loss of earning potential. Rehabilitation will include medical and psychological care, as well as access to legal and social services. The guarantees of non-repetition will include, among other things, the cessation of continuing violations, the verification of the facts and the full and public disclosure of the truth, apologies and acceptance of responsibility, the commemoration of victims, human rights education, the strengthening of the independence of the judiciary, etc.[1503]

Adjudication comprises the prosecution and judgement of perpetrators. In the next section, reference will be made to international law, which, for that matter, is not all that developed at the level of legal proceedings and punishment. Besides the legal perspective, the question is raised of the political expediency to prosecute, judge and punish all those who have committed crimes, even if these are sanctioned by national legislation. How does one prevent the judicial proceedings from plunging the country into long-term political instability? How does one prevent the trials from serving other objectives such as political interests, personal vendettas, ethnic or regional discrimination?[1504] How does one elaborate a strategy for legal proceedings in cases where repression has been more or less widespread and evidence against the numerous perpetrators will be hard to find? In a military but also administrative context, what is the responsibility of a superior for the acts committed by a subordinate, and that of a subordinate for acts ordered by his superior? Under this same chapter, matters relating to amnesty and pardon also need to be dealt with. The difference between the two is

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[1502] United Nations Economic and Social Council, Commission on Human Rights, Question of the human rights of all persons subjected to any form of detention or imprisonment. Note by the Secretary-General, E/CN.4/1997/104, 16 January 1997, p. 3.

[1503] The debate concerning these principles and directives is far from over. The Secretary General presented the comments and observations of several states on the text elaborated by *van Boven* to the 54th session of the Human Rights Commission, (E/CN.4/1998/34, 22 December 1997).

[1504] The legal proceedings of a "new regime" could create the occasion to detain not only those who are really responsible for past crimes, but also the current opposition who are not guilty of anything. In Ethiopia, after the departure into exile of the former president *Mengistu* in 1991, the bodies of thousands of persons who were killed or "disappeared", were found, exhumed and buried. Trials of those responsible only really started in March 1995. The majority of those accused were members of the security forces, the former party in power or from the government of *Mengistu*. In July 1996, some 1,700 other persons were detained without being charged; some persons for over 5 years. According to Amnesty International, some of these persons were arrested without being indicted because of their criticism of and opposition to the new government (Amnesty International, *Ethiopia. Human rights trials and delayed justice. The case of Olympic gold medallist Mammo Wolde and hundreds of other uncharged detainees*, London, July 1996).

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essential, to the extent that amnesty erases the offence in question and can, among other things, put an end to ongoing investigations. Pardon, on the other hand, only comes into play after the prosecution and judgement and only has consequences at the level of execution of the sentence.

c. In international law

In international human rights instruments, there are, generally speaking, few explicit references in covenants or conventions regarding the prosecution of those responsible for human rights violations or regarding the corresponding penalties. Nevertheless, *Roth-Arriaza* finds that since the second world war, the principle of universal competence, which offers any State the possibility to bring any suspected perpetrator to trial, is being applied to an increasing number of crimes. Moreover, this competence is no longer simply authorised, but is becoming increasingly obligatory (in the form of domestic prosecutions or extradition). This principle is applied to, among others, war crimes and crimes against humanity, including genocide.[1505] The Convention on the Prevention and Punishment of the Crime of Genocide explicitly requires that the Contracting Parties "enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide ...".[1506]

Moreover, the application of some international human rights standards that do not explicitly require the prosecution of suspected perpetrators has given rise to more progressive interpretations regarding the prosecution of suspects and the compensation of victims. In this context, this dissertation will be confined to the International Covenant on Civil and Political Rights, which was ratified by Rwanda in 1975. In Article 2, the Covenant provides that "each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant ...". In a number of cases of torture, summary execution and/or disappearance, the Human Rights Committee, established under Article 28 of the Covenant, interpreted this article in the sense that investigations against those responsible and compensation of victims are included in the obligation to guarantee the recognised rights. In addition, protection from torture or from cruel, inhuman or degrading treatment (article 7) requires that individual complaints are examined, that those responsible be held accountable and that victims have a right to redress, including a right to compensation. The Committee is also opposed to the

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[1505] For more details see, Joyner, C., "Arresting Impunity: the Case for Universal Jurisdiction in Bringing War Criminals to Accountability" in Bassiouni, C. and Morris, M. (eds.), *Accountability for international crimes*, Special Issue of *Law and Contemporary Problems*, Vol. 59, No. 4, Autumn 1997, p. 148-167.

[1506] Article 5.

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granting of amnesty for acts of torture.[1507] In some provisions, the Covenant is even more explicit concerning a victim's right to compensation. Article 9 specifies that "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation".

Roht-Arriaza also devotes a chapter to measures of amnesty, not only from a perspective of political expediency, but also from a legal perspective. On one hand, there are very few explicit bans on amnesty in international law instruments. Moreover, the second protocol of the Geneva Convention dealing with the issue of internal armed conflicts, which came into effect in 1978 and was ratified by Rwanda, invites states to consider amnesty for participants in an armed conflict: "At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained". (Article 6(5). [1508] On the other hand, however, the above-mentioned, more recent interpretations of the obligations of a State to guarantee fundamental rights, seem to limit the possibilities to grant generalised amnesties to those responsible for more serious violations of human rights.

d. Set of principles for the protection and promotion of human rights through action to combat impunity

In the context of international law, reference must also be made to a recent development which, given the date of publication of her study, was obviously not examined by *Roht-Arriaza*, namely the report regarding the question of impunity of perpetrators of human rights violations which Special Rapporteur *Joinet* submitted to the 49th session of the UN Sub-commission on prevention of discrimination and protection of minorities.[1509] In his report, the author proposes 50 principles which should guide states in their action to combat impunity. He groups them in three categories: the right to know, the right to justice and the right to reparations.

The right to know goes beyond an individual victim's right to the truth. The right to know is also a collective right of a society, drawing upon history to prevent violations from recurring in the future. The duty to remember on the part of the State corresponds to the right to know. In order to achieve

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[1507] Roht-Arriaza, N., Impunity and Human Rights, p. 29

[1508] Additional Protocol to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), UN Doc A/32/144, Annex II (1977). For some problems concerning the application of this article, see Roht-Arriaza, N., "Combating Impunity: Some Thoughts on the Way Forward" in Bassiouni, C. and Morris, M., Accountability for International Crimes, p. 91.

[1509] UN Commission on Human Rights, The Administration of Justice and the Human Rights of Detainees. Question of the impunity of perpetrators of human rights violations (civil and political). Final report prepared by *Mr. Joinet* pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20, 26 June 1997.

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this collective right, *Joinet* considers that, in the context of mass violations, a judicial system is often not capable of rendering justice by identifying, prosecuting and sentencing perpetrators within an acceptable timeframe. He proposes, henceforth, the prompt establishment of an extra judicial commission of investigation, with certain principles to guarantee its independence and impartiality and to protect victims, witnesses and suspected perpetrators. As a result, the names of the latter may only be published if they had the opportunity to be heard before the commission or to exercise a right of reply in writing. In order to contribute to the collective memory of the society, the commission's report should be distributed as widely as possible.

The right to justice implies that a victim can assert his or her rights and receive a fair and effective remedy. If forgiveness is to be granted, it must first have been sought. The right to justice entails corresponding duties of the State to conduct investigations, prosecute perpetrators and punish them if their guilt is established. The trials before the judicial authorities, should, in any event, be in conformity with human rights, and meet the fair trial standards. Matters such as prescription, amnesty, the right to asylum, extradition, due obedience as a mitigating circumstance, procedures of repentance and confession and military jurisdictions cannot be conceived and/or applied in such a way that they harm the fight against impunity. The instrument of amnesty, has, in fact, rarely been envisaged by the UN, which corresponds to the above-mentioned tendencies in the interpretation of the State's obligation to protect human rights. The UN's policy on this point, does not, however, seem to follow an all too consistent line. In August 1992, for example, after the publication of the report of the *Goldstone* Commission[1510] in South Africa, the Secretary General of the United Nations recommended that amnesty be granted to all those perpetrators of political crimes committed in the period covered by the Commission.[1511]

The right to reparation is situated at both the individual and collective levels. At the level of the individual victim, including relatives or dependants, this right includes his restoration, to the extent possible, to his situation preceding the violations, compensation (for physical and mental injury, including lost opportunities, physical damage, defamation and legal aid costs) and rehabilitation (including medical care and psychological treatment). At the collective level, one finds commemoration and public homage to the memory of victims, as well as some steps to avoid the reoccurrence of these events: the dismantling of armed parastatal groups, the repeal of emergency

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[1510] The commission's official name was "the Commission of Inquiry into Public Violence and Intimidation". It was set up following violent incidents which, between July 1990 and June 1992, cost the lives of about 6,200 persons.

[1511] Roht-Arriaza, N., Impunity and Human Rights in International Law and Practice, New York, Oxford University Press, 1995, p. 271.

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legislation and abolition of emergency courts, the removal from office of senior officials implicated in serious violations.

In his report, Special Rapporteur *Joinet* tried to elaborate rather general principles, without bearing in mind the specific situation of any particular country. Nevertheless, it is noteworthy that in the conclusion of his report, the author explicitly refers to the Rwandan situation, and leaves little hope for an immediate solution:

> In concluding, the Special Rapporteur would like to draw attention to a number of particularly alarming situations for which he must admit he has no solutions to propose, though such situations - albeit largely for technical reasons - help to perpetuate impunity. How is it possible to combat impunity and ensure a victim's right to justice when the number of people imprisoned on suspicion of serious human rights violations is so large that it is technically impossible to try them in fair hearings within a reasonable period of time. Mention can be made of the case of Rwanda ... .[1512]

To sum up,

> No society can come to terms with the past unless what really happened has been generally acknowledged. ... Reconciliation between opposing classes or other groups can only be realised once the facts, the background, motives and emotions have been recognised and admitted by both sides.[1513]

The element of truth is essential and has great value. Therefore, although a general amnesty has been declared in the days following the publication of the report of the Truth Commission in El Salvador, its chairman nevertheless considers the report to be of great value, more particularly given the popular support which was expressed in an opinion poll: 45% approved, 27% disapproved while 27% had no opinion.[1514] At the same time, the element of truth constitutes a prerequisite *sine qua non* for all other steps or initiatives of mediation, reconciliation, compensation and justice. In order to define the concept of truth in this context, *Bronkhorst* refers to the theories of *Jürgen Habermas*, who, in his *Theory of Communicative Action*, distinguishes three main elements: (1) a communication intended to convey the truth must correspond to the facts; (2) the message should comply with a normative system which allows those for whom it is intended to understand it and to make a judgement; (3) the message should be sincere or truthful. The body charged with establishing the truth should therefore, first of all, reconstruct and describe the events in an accurate manner. Next, it should communicate and present its message in a language that is accessible to a

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[1512] UN Commission on Human Rights, The Administration of Justice and Human Rights of Detainees, p. 9.

[1513] Bronkhorst, D., Truth and Reconciliation, p. 150.

[1514] The approval rate was particularly high among the working class (Bronkhorst, D, Truth and Reconciliation, p. 149).

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large section of the population, which is not, in fact, necessarily the legal language of a magistrate, for example. Not only the language but also the context in which it is presented, could determine the degree of truth which the population attaches to the message: depending on local culture, the normative system could possibly require some type of ceremony, for example. Finally, the investigators, and also preferably those responsible for the follow-up, should, at all times, emulate truthfulness and a personal commitment.

The investigations are usually conducted by a commission set up by the executive or legislative power. Operational independence, widespread support and the respect of the population both at the level of national political actors and international partners, are prerequisites for the success of the commission in its efforts to reconstruct the collective history of the nation. This could require the involvement of persons representing all political tendencies, and, possibly, the auspices of an international organisation, as was the case in El Salvador, for example. Various factors can complicate the tasks of such a commission. Its effectiveness seems dependent on the timeframe established for the presentation of its report. On the other hand, this should in no way limit painstaking inquiries. The legal powers of the commission to interrogate witnesses, to have access to locations and to consult documents are often limited, not only by the mandate of the commission, but also the conditions in the field. To this, one could also add the problem of defining and co-ordinating interaction with the official judicial investigations. What is extremely delicate is determining the *ratione materiae* mandate: should one only concentrate on the most serious and systematic violations? Should an inquiry be conducted into the abuses committed by the (former) armed opposition?

All truth and reconciliation processes should also contribute to strengthening the rule of law. All measures taken should ensure better protection against arbitrary violence by those in power. The process of truth and reconciliation should be democratic and transparent. It should be based on the major involvement and participation of the population. It should take place in all openness and under the watchful eyes of the national and international communities. The victims have the right at least to moral and, if possible, material compensation. This does not mean that the group that was victimised under the old regime, can, by definition, exercise moral superiority *vis-à-vis* the others. The trial of all perpetrators of violations will often be impossible because of the large number of crimes committed, or because of the political motives surrounding the trials of highly placed officials. However, in order to be successful, the reconciliation process requires the sentencing of those persons who ordered the most serious violations. Reconciliation has trans-border implications. The international community should assume its responsibility, because, quite often, crimes have been committed

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against humanity. All of the truth and reconciliation process should take place within the confines laid down by international law. Unfortunately, *Roht-Arriaza* notes that not only the national authorities, but also peace and mediation initiatives under the auspices of an international agency, do not systematically refer to this international legal framework.[1515]

Bronkhorst notes that unfair trials or the reversal of judicial decisions by the executive power have a disastrous effect on the credibility of the institutions. On this subject, *Roht-Arriaza* rightly observes that past human rights violations were often tolerated by the old judicial system that did not have sufficient independence to be able to constitute a real counter power. It may easily give way to a popular perception of a partial and dependent judicial system, steered by political considerations. This past can also weigh on the "new" judicial system. Finally, *Roht-Arriaza* notes that the number of crimes committed often (not only in the case of Rwanda) exceeds the capacity of the judicial system. This in itself generally requires that a selection be made of the crimes to be prosecuted. The problem therefore arises of determining a prosecution strategy: should priority be given to the highly placed instigators and organisers of violations, or should one adopt an approach which is more focused on the victim, thereby prosecuting those who have visibly committed the violations? Non-criminal but civil, administrative and/or disciplinary sanctions may provide for a somewhat easier solution. This may entail, among other things, a demotion in the military or administrative hierarchy, the suspension of the right to vote, the loss of employment or of the entitlement to pension, etc.

3.9.2.3 Application to Rwanda

In this part, an attempt will be made to try to apply the above-mentioned findings to the Rwandan scenario, starting with some characteristics of the Rwandan situation that will indicate similarities and differences *vis-à-vis* other case studies.

3.9.2.3.1 A unique context of political transition

The analysis presented by *Bronkhorst* and others concerning certain models of political transition is not necessarily applicable to the Rwandan situation. In a simplified manner, one could summarise it as follows:

[1515] It follows that the directives as proposed by Rapporteur Joinet and based, among other things, on international law, are important and should be integrated into the international diplomatic and mediation efforts (Roht-Arriaza, N., "Combating Impunity: Some Thoughts on the Way Forward" in Bassiouni, C. and Morris, M., Accountability for International Crimes, p. 93).

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1. As in many of the other cases, the numerous human rights violations took place during a period of intensified political transition, which was spurred on by internal and international factors.

2. Contrary to the other cases, like Benin and Malawi for example, a situation of war, which coincided with the start of a wave of political liberalisation in Africa, interfered with the domestic process of political transition.

3. This combination led to a unique, tripolar situation (comprising the former single party, the armed opposition and the unarmed internal opposition), which was reflected in the negotiations and the *Arusha* Accords, which, at the same time, sought to meet not only the national and international calls for political liberalisation but also to put an end to the war. In fact, although the signatories to the accords only represented two parties, the tripolar system is explicitly reflected in some protocols.[1516]

4. This new political "equilibrium" was destroyed, first of all by internal divisions within the unarmed opposition and subsequently by, on the one hand, the planning and implementation of the genocide and political massacres by the former regime (and its supporters) and on the other hand, the resumption of war and massacres of Hutu people by the former armed opposition.

5. The tripolar system is no longer in existence. The unarmed opposition has been almost totally eliminated. The former single party and its 'supporters' are almost totally identified with the genocide, and, consequently, have lost all credibility in the eyes of the international community. This only leaves the "victor" who has lost nearly all of his internal popular base.

6. Nevertheless, the final pole remaining has continuously stated its intention to build on the Accords, which are tripolar in nature and origin. The implementation of these Accords, especially the political aspects, is increasingly difficult, if not impossible.

3.9.2.3.2 The Arusha Accords and the truth and reconciliation approach

As an instrument and the translation of political transition, the *Arusha* Accords cover a wide range of subject matters. First of all, they constitute a peace agreement. Within the context of this dissertation, however, the author will focus on matters relating to the promotion and protection of human rights, reconciliation and the fight against impunity. This section therefore constitutes a first confrontation of the Rwandan context with the findings in the preceding sections. It should be

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[1516] Therefore, articles 55 and 56 of the Protocol of Agreement on power-sharing within the framework of a broad-based transitional government refer to the distribution of government portfolios among the 6 political parties (the MRND, RPF, MDR, PSD, PL and the PDC).

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repeated that, in this context, the *Arusha* Accords have more than a purely historical value: to date, they form an integral part of the fundamental law of the country.[1517]

a. The judiciary

The Protocol of Agreement on power sharing within the framework of a broad-based transitional government reaffirms the independence of the judiciary. It plans the creation of a Supreme Court, comprising a Department of Courts and Tribunals, a Court of Cassation, a Constitutional Court, a Council of State and a Public Accounts Court (Article 28). The protocol also foresees the creation of a Supreme Council of Magistrates which decides on the appointment, termination of services and, in general, the administration of the career of judges (Article 39). The protocol authorises the legislator to create specialised courts of law, but prohibits the creation of special courts (Article 26). In accordance with the *Arusha* Accords, the new regime has effectively established the Supreme Court and the Supreme Council of Magistrates.[1518] The creation of specialised chambers within the tribunals of first instance and the military courts by the Organic Law of 30 August 1996 is not in contradiction to the Arusha Accords.

The "new" judicial system has inherited the popular perception of the former judicial system as being a dependent institution guided by political and personal interests and motives. Generally speaking, at the level of the State, justice has never been perceived as a source of truth, but rather as an instrument in the hands of those in power. This goes against the traditional justice system (non-State) of which the objective was mainly to re-establish social harmony.[1519] Given this reputation and the experiences to which the population had been subjected for numerous years, why would people expect it to be different this time? To this, can be added the new regime's gradual monopolisation of power along ethnic lines, the judicial system being seen as one of the emanations of this power.[1520]

[1517] On the occasion of the third anniversary of the installation of the Transitional National Assembly, its president is said to have stated that *Arusha* remains the basis of the Constitution in terms of power sharing. However, according to some observers, one section of the political class would prefer to do away with the *Arusha* equilibrium. (Lauras, D., *Le partage du pouvoir issu des Accords d'Arusha remis en question*, AFP, 25 November 1997).

[1518] *Loi organique n° 03/96 du 29 mars 1996 portant organisation, fonctionnement et compétences du Counseil Supérieur de la Magistrature* (*Journal Officiel de la République Rwandaise*, 1 avril 1996); Organic Law n° 07/96 of 6th June 1996 relating to the organisation, working and competence of the Supreme Court (*Journal Officiel de la République Rwandaise*, 10 June 1996).

[1519] On the occasion of a conference "La justice nationale et internationale devant le génocide rwandais", organised by ASSEPAC, the International centre for the study and the promotion of human rights and information, in November 1997, Professor Charles Ntampaka illustrated how the challenges which the judicial system faced in the past, continue to date: thus, he distinguished between the need to reconcile justice with the law, with the population and with the separation of powers.

[1520] A sociological field research would be necessary to give a more scientific character to this assertion.

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Whether or not this corresponds to reality, this perception, above all nurtured under the former regime, is extremely important in the context of truth and reconciliation. This undoubtedly reduces the role the judicial system can play as an instrument to discover the collective truth and to promote reconciliation.

b. The specialized commissions

The Protocol of Agreement on power sharing includes the creation of 3 broad-based specialised commissions (Article 24). The Commission of National Unity and National Reconciliation would be charged with the preparation of a national debate on unity and reconciliation and the preparation and dissemination of information aimed at educating the population and achieving national unity and reconciliation. This commission was indeed established by presidential order in October 1997.[1521] It consists of 12 members appointed by the president on the advice of the cabinet. This commission should sensitise Rwandans with regard to national unity, promote the culture of reconciliation, fight all forms of sectarianism and division, prepare a national programme for unity and reconciliation and sensitise Rwandans to their rights (Article 5). The Legal and Constitutional Commission would be responsible for drawing up a list of required amendments to render national legislation to conform to the provisions of the *Arusha* Accords, in particular those relating to the rule of law. This commission would also prepare a preliminary draft of the Constitution that will govern the country after the transitional period. The Electoral Commission would be charged with preparing and organising local, legislative and presidential elections.

The Protocol of Agreement on the rule of law foresees the establishment of an independent National Commission on Human Rights, responsible for investigating human rights violations committed on Rwandan territory, instituting legal proceedings where necessary, as well as for sensitising and educating the population about human rights. In October 1995, the government introduced a draft law for the establishment of this commission. This was withdrawn for revision two months later, because of comments received from the UN High Commissioner for Human Rights, among others.[1522] In November 1997, however, a Commission on Human Rights was nevertheless created, not by a law, but by a presidential order. According to Article 2, "the Commission is independent".

[1521] Article 5 of Presidential Order n°25/01 of 25/10/97 establishing the Rwanda National Unity and Reconciliation Commission, *Official Gazette of the Republic of Rwanda*, 1 November 1997, modified by Presidential Decree n°01/01 of 10/01/1998, *Official Gazette of the Republic of Rwanda*, 15 March 1998.

[1522] The draft law was checked against the "The Paris Principles", which contain international guidelines concerning the structure, functioning and the independence of national human rights commissions (*Report of the Special Representative of the Commission on Human Rights on the situation of human rights in Rwanda*, A/52/522, 22 October 1997, p. 8).

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Nevertheless, according to Article 8, "the members of the Commission are chosen by the National Assembly out of 10 candidates nominated by the Government. They will serve a three year term which can be renewable".[1523]

The establishment and the mandates of the above-mentioned commissions correspond fairly well to some of the elements of truth and reconciliation initiatives that *Bronkhorst* and *Roht-Arriaza* have analysed. These mainly concern elements such as the prevention of future violations, by, for example, strengthening the rule of law, sensitising the population and ongoing monitoring of human rights protection. On the other hand, aspects concerning investigations, trials, punishment and compensation of victims do not seem to have been addressed.

c. The International Commission of Inquiry

Article 16 of the Protocol of Agreement on the rule of law stipulates that "the two parties also agree to establish an International Commission of Inquiry to investigate human rights violations committed during the war". This commission seems to correspond to the first element of a truth and reconciliation process as described by *Bronkhorst* and *Roht-Arriaza*: reconstruction of the collective truth of past events. Article 16 gives but a few explicit indications regarding the mandate and functioning of the commission:

- Firstly, it is anticipated that everything will take place under international auspices, which undoubtedly corresponds to the need for independence and absolute moral authority essential for all investigative and truth commissions. Such was also the case in El Salvador, for example, where an Argentine national was president of the Truth Commission, established following the peace agreement in 1991.

- Next, the *ratione temporis* mandate of the Commission seems limited to the period of the war, presumably, therefore, between 1 October 1990 and 4 August 1993, the date when the peace

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[1523] Presidential order n°26/01 of 11/11/97 establishing the National Human Rights Commission, *Official Gazette of the Republic of Rwanda*, 1 December 1997. With respect to the composition of a national commission on human rights, the Paris Principles prescribe that "the appointment of its members, whether by means of an election or other system, shall be established in accordance with a procedure which affords all guarantees to ensure the pluralist representation of the social forces (of) civilian society involved in the protection and promotion of human rights" *(Principles relating to the status of national institutions for the promotion and protection of human rights, Annex to General Assembly Resolution A/RES/48/134, December 20, 1993)*. The Special Representative for Rwanda of the UN Commission on Human Rights had strongly recommended that there be a full and open debate on the creation of a Commission before it was actually brought into being. He was therefore "surprised to learn" that the above-mentioned presidential order had been published (UN Commission on Human Rights, *Report on the situation of human rights in Rwanda submitted by the Special Representative, Mr. Michel Moussali, pursuant to resolution 1997/66*, E/CN.4/1998/60, 19 February 1998, par. 38).

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agreement was signed between the president of the Rwandan Republic and the president of the RPF

- Can one assume that the human rights violations committed by both sides were implicitly covered by the *ratione materiae* mandate of the Commission? A positive answer seems most logical and obvious.

Many other implementation modalities of this provision require clarification: nothing is mentioned concerning prosecution of perpetrators, possible amnesty measures, possible compensation for victims, possible disciplinary or administrative sanctions, etc. Regarding the latter aspect, reference should, however, be made to Article 46 of the Protocol of Agreement on power sharing, which states that "as a matter of urgency and priority, the Broad-Based Transitional Government shall rid the administrative apparatus of all incompetent elements as well as authorities who were involved in the social strife or whose activities are an obstacle to the democratic process and to national reconciliation". Although human rights violations are not explicitly mentioned, the wording of this article also seems to cover them.

Imagine a situation in which no genocide has been committed and an international commission would need to be set up in accordance with the *Arusha* Accords. This would be the context which corresponds to most of the situations analysed by *Bronkhorst* and *Roht-Arriaza* and, consequently, in which their conclusions and recommendations would be more applicable to the case of Rwanda. In fact, there is no doubt that, in such case, the international community, beginning with Amnesty International and others, would have insisted on fighting impunity, the need to prosecute and punish those responsible for violations, the unacceptability of an amnesty and other modalities. This is also the situation in which the international community would probably have had difficulties in convincing the new transitional government, and avoiding that the past is forgotten and that the truth is not sacrificed in the interest of short-term stability and the new balance of power. In reality, a genocide did take place and a process of truth and reconciliation must confront a totally different context than that which was initially foreseen. The next section examines these differences as well as the constraints and specificities which make it even more difficult to apply the conclusions and recommendations of both reference works.

Before concluding this section on the value of the *Arusha* Accords in a context of truth and reconciliation and on the creation of the various commissions, reference can be made to part of the

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prime minister's declaration, entitled "*The Democratization Process*", on the occasion of the Round Table conference held in Geneva in June 1996:

> The Rwandan Government intends to set up shortly, the different commissions foreseen under the *Arusha* Peace Agreement, beginning with the National Commission on Human Rights and the International Commission of Inquiry to investigate human rights violations committed during the war, the massacres and genocide. Both commissions will mainly examine the various human rights violations committed by anyone on Rwandan territory and in countries hosting refugees, particularly by State organs or organisations under State control or other organisations.[1524]

In his speech, the Prime Minister thus seems to indicate that his government has decided to extend the *ratione temporis* and *ratione loci* mandate of the International Commission of Inquiry. Moreover, he explicitly states that, *ratione materiae*, the International Commission of Inquiry will investigate the violations committed by all parties involved in the conflict.

Finally, it goes without say that this Commission, or, in more general terms, a truth and reconciliation initiative could also rely on the work and numerous reports published by national and international human rights NGOs[1525] and by the United Nations Special Rapporteur. An excellent job was accomplished by the International Commission of Inquiry, composed of representatives from four international NGOs[1526], whose report was published in February 1993, after a two-week field visit in January 1993. Contrary to some analyses[1527], this commission of inquiry was independent, established at the request of Rwandan NGO associations, and had "nothing to do with the official proposals of the government and the RPF"[1528], agreed in the above-mentioned protocol of agreement.

[1524] "Déclaration de S.E.M. Pierre Célestin Rwigema, Premier Ministre de la République Rwandaise" in PNUD, *Conférence de Table Ronde pour la République Rwandaise. Rapport de la Conférence*, Geneva, June 1996, p. 66. Translated by Vandeginste in Truth and Reconciliation Approach, 1997

[1525] Some NGOs have already made an appeal in the sense of this study: It is vitally important that the truth be told about the crime of genocide committed in Rwanda. This report is a first exercise in doing this; African Rights hopes that it will be followed by other investigations by Rwandans into what has happened ... . Truth telling is the most basic form of justice ... . Exposure is also, in itself, a measure of punishment for those responsible". AFRICAN RIGHTS, Rwanda. Death, Despair and Defiance, London, 1995, p. 1162.

[1526] The *Fédération Internationale des Droits de l'Homme* (FIDH), Africa Watch, the *Union Inter-Africaine des Droits de l'Homme et des Peuples* and the International Centre for Human Rights and Democratic Development.

[1527] "The roots of the Rwandan Truth Commission lie in an agreement between the government and the armed opposition to establish a commission of inquiry into past atrocities - agreed to in the Arusha Accords negotiated in Arusha, Tanzania, in the fall of 1992". Hayner, P., Lessons from the Past: Thirteen Truth Commissions - 1974 to 1993, Colombia University, 1993, p. 56.

[1528] FIDH, *Violations massives et systématiques des droits de l'homme depuis le 1er octobre 1990*, Paris, 1993, p. 6. Translated by Vandeginste, Truth and Reconciliation Approach, 1998.

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3.9.2.3.3 Specific constraints

Undoubtedly, it is difficult to compare the Rwandan case to other experiences. In the preceding section, reference has already been made to the unique character and context of political transition. Other particularities give rise to certain constraints requiring a more detailed study in view of the development of a truth and reconciliation initiative for Rwanda. In this context, we have tried to identify some key questions, which are by no means exhaustive.

a. The ratione materiae mandate

Any truth and reconciliation initiative would need to address not only massive human rights violations and war crimes, but also acts of genocide. This was not the case in the large majority of case studies in the reference works. Furthermore, the Convention on the Prevention and Punishment of the Crimes of Genocide explicitly requires that contracting parties (including Rwanda) enact effective criminal sanctions for persons guilty of genocide. Despite this fundamental "qualitative" difference, one can, however, hardly imagine that a non-judicial initiative would only be addressing those violations which are not classified as genocide and that it is excluded for all acts of genocide (including for example, the violations committed by persons covered by Category three of the Organic Law of 30 August 1996[1529]).[1530]

To this "qualitative" constraint, one may add the "quantitative" challenge: the number of victims and the number of crimes committed largely surpasses those in the other case studies[1531]. This does not only constitute a major constraint for the current judicial approach, it also makes truth telling of what happened on every hill and the compensation of victims all the more difficult in a non-judicial truth and reconciliation approach. This would therefore require the deployment of numerous roving sub-commissions of a truth commission.

These qualitative and quantitative specificities also mean that there has been an enormous destruction within the society itself. The challenge of rehabilitating this society and reconciling its members is therefore gigantic.

[1529] "Persons whose criminal acts or whose acts of criminal participation make them guilty of other serious assaults against the person". Reference is made to any serious assault not causing death.

[1530] According to Landsman, on the other hand, a truth and reconciliation process should not be used for certain violations of human rights, including genocide (Landsman, S., "Alternative Responses to Serious Human Rights Abuses: Of Prosecution and Truth Commissions" in Bassiouni, C. and Morris, M., Accountability for International Crimes, p. 84).

[1531] Reyntjens has estimated that approximately 1,100,000 person were killed: 600,000 Tutsi and 500,000 Hutu (Reyntjens, F., "Estimation du nombre de personnes tuées au Rwanda en 1994" in Centre d'étude de la Région des Grands Lacs d'Afrique, *L'Afrique des Grands Lacs. Annuaire 1996-1997*, Paris, L'Harmattan, 1997, p. 182).

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b. The ratione loci and ratione temporis mandate

On several occasions, authors have proposed a regional approach to the different crises in the Great Lakes region. This approach could take the form of a regional conference[1532] or an extension of the ICTR's mandate[1533], etc. This idea effectively corresponds to real interdependence and interaction at the political, military and economic levels. Nevertheless, the *ad hoc* and short-term nature of regional alliances seems to indicate that the crises in the region, while having regional repercussions, are first of all composed of internal crises at the domestic level. Already in the past, the idea of a purely regional approach has been used as a pretext to avoid all national initiatives.[1534] In any case, the *ratione loci* mandate is an important question to be resolved. Some answer has been given by the Prime Minister in his above-mentioned declaration at the Round Table conference in Geneva in June 1996: "Both commissions will mainly have to examine the various human rights violations committed by anyone present on 'Rwandan territory and in countries hosting refugees', particularly by State organs or organisations under State control or other organisations".[1535] The violations committed on non-Rwandan territory and mentioned in the speech of the Prime Minister, were mainly carried out by former soldiers of the *Forces Armées Rwandaises* and members of the *Interahamwe* militia. To these violations must be added those committed by the RPA in its operations during and after the period under study inside and outside Rwanda.

This brings us to the question of the *ratione temporis* mandate. The mandate of the Commission of Inquiry into Violations of Human Rights in Uganda, covered the period between October 1962 and January 1986. In many other cases, beginning with South Africa, the period covered by a truth and reconciliation initiative has been relatively long. A long history or even tradition of repression and human rights violations should not, in itself, limit the possibilities of such an approach. There is little doubt that determining the *ratione temporis* mandate would give rise to a major discussion in the Rwandan context. One could, for example, include the events of 1959, but also the RPA operations in eastern Zaire in 1996 - 1997, and in the northwestern part of Rwanda in 1997 - 1998. From a

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[1532] See, for example, Frère des Hommes, *Une seule terre*, Numéro Spécial Zaïre-Rwanda, December 1996, p. 6.

[1533] See, for example, UN Commission on Human Rights, Initial report on the human rights situation in Burundi submitted by the Special Rapporteur, M. Paulo Sergio Pinheiro, in accordance with Commission resolution 1995/90, E/CN.4/1996/16/Add.1, 27 February 1996, par. 69.

[1534] See International Crisis Group, *Great Lakes Exploratory Mission*, Working Document, 1997, p. 2; see also, the comments of Reyntjens concerning the idea of a regional conference in: Stiftung Wissenschaft und Politik, Improving African and International Capabilities, p. 131-132.

[1535] "Déclaration de S.E.M. Pierre Célestin Rwigema, Premier Ministre de la République Rwandaise" in PNUD, *Conférence de Table Ronde pour la République Rwandaise. Rapport de la Conférence*, Genève, June 1996, p.66. Translated by Vandeginste, Truth and Reconciliation Approach, 1998.

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comparative perspective, one should note that the ICTR's mandate covers, as already seen, the period between the beginning of January and the end of December 1994. The Organic Law of 30 August 1996, on the other hand, deals with the period between 1 October 1990 and 31 December 1994. The International Commission of Inquiry, provided for by the Arusha Accords, logically covered the period between 1 October 1990 and 4 August 1993, but its envisaged mandate seems to have been explicitly extended by the Rwandan Government, as indicated in the declaration of the Prime Minister at the Round Table conference in Geneva in 1996.

c. The relation with the judicial approach

This dissertation does not, in any way, constitute a plea to abandon the judicial approach. On the contrary, the Rwandan Government and its international partners should strengthen and accelerate their efforts in the judicial domain (both at the level of training human resources, institutional capacity building, detention conditions, the right to legal counsel, etc.), while certain conditions should be imposed and their non-respect should be sanctioned (like, for example, the unconditional access of international observers to detention centres in military camps, the condemnation of the activities of the so-called syndicates of denunciation, etc.).[1536]

A complementary non-judicial approach in the form of a truth and reconciliation initiative should, from the outset, elaborate a working relationship with the judicial system. Nevertheless, it seems important that this initiative avoids, at all costs, being presented or perceived as having its origins in the same judicial system. As an illustration of the delicate relations to be defined between both approaches, reference is made to *Sarkin* concerning the role of a possible truth commission in the context of the confession and guilty plea procedure, established by the Organic Law of 30 August 1996. *Sarkin* presents the general lines of two options regarding the confessions which detainees would present to the commission: the commission would either have to submit this confession to the judicial system, which would do the follow up, or, the commission is given the power to impose sanctions or civil compensations or grant pardon. According to him, even in the scenario of a more limited mandate of the commission, an individual perpetrator may more easily make a confession before this non-judicial authority, which would serve as a facilitator.[1537] In this regard, it can be

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[1536] See, Vandeginste, S., Justice for Rwanda and International Cooperation, Working Paper, Antwerp University, September 1997, also published on CD n°4 and 5 of the Geneva-based International Documentation Network on the Great African Lakes Region.

[1537] Sarkin, J., "Lessons from other Commissions around the World. The Mechanics of a Commission for Rwanda.", in Newick Park Initiative, *Le rôle de l'église dans la Restauration de la Justice au Rwanda (Rapport de la Conférence tenue à Kigali du 19 au 21 août 1997)*, Cambridge, September 1997.

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suggested that both options be maintained and applied in accordance with the categorisation foreseen under the Organic Law.

Once again, emphasis can be put on the added value that this non-judicial initiative would bring to the treatment of individual cases, apart from increasing the institutional capacity to deal with larger numbers of dossiers. The identification, prosecution and sentencing of perpetrators of human rights violations through the judicial approach are, in fact, of vital importance, but will they help to achieve the traditional objective of justice, notably, the re-establishment of the social order and harmony, which has collective rather than individual dimensions? This is another level where a non-judicial alternative could complete the present judicial approach.[1538]

d. The situation of rebellion and war

We have seen that even after the so-called end of the war in July 1994, violence continued in Rwanda, initially, on a very reduced scale, gradually increasing during the years of 1996, 1997 and the beginning of 1998, especially after the massive return of refugees in November and December 1996. In June 1997, the Phases and Security Procedures of the United Nations considered a third of communes to be "inaccessible" to UN personnel, and another third of the communes as requiring "a military escort". The current situation, at the beginning of 1998, pits the Rwandan army against a hardly identified rebellion[1539], without a clear programme[1540] or political spokesperson; it is not at all clear whether it concerns a well-organised structure or what the role of certain former leaders of the former armed forces or militia might be. The number of human rights violations is increasing[1541]. In such a context, it is difficult to protect and promote human rights. The problems that the High

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[1538] "These issues (individual trials against genocide suspects), while important, have little to do with reconciliation or 'righting' the situation so that the survivors can re-establish congenial relations with other Rwandans who may or may not have participated in the genocide". Waters, T., "Conventional Wisdom and Rwanda's Genocide: an Opinion", *African Studies Quarterly*, Vol. 1, n° 3, 1997. See also: Ayindo, B., "Retribution or Restoration for Rwanda", Africanews, Nairobi, 15 January 1998.

[1539] In fact, the rebels rarely identify themselves. The leaflets which the ALIR (*Armée pour la libération du Rwanda*), the armed branch of PALIR (*Peuple armé pour la libération du Rwanda*), left behind during a rebel attack at Nyabikenke (in Gitarama prefecture) on 5 January 1998, is an exception. More recently, an organisation called "*Abatabazi. Forces combattant pour la démocratie et les droits de l'homme au Rwanda*", would have distributed pamphlets (Cros, M.F., "Le FPR se réorganise et place Kagame à sa tête", *La Libre Belgique*, 17 February 1998.

[1540] A spokesperson gave a vague indication of the objective of the rebellion, following an attack on a lock-up in the Gisenyi prefecture on 2 December 1997: "The aim of the insurgency is the control of the two prefectures - the traditional home of Hutu nationalism - as a precursor to negotiations over power sharing with the authorities in Kigali. Amnesty for génocidaires would be one of the preconditions for a peace deal" *UN Department of Humanitarian Affairs, IRIN Update for Central and Eastern Africa, N° 305, Nairobi, 3 December 1997.*

[1541] See, for example, Amnesty International, Rwanda. Civilians trapped in armed conflict. "The dead can no longer be counted", London, 19 December 1997.

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Commissioner for Human Rights faced in the field illustrate these difficulties.[1542] The same is also true for a possible truth and reconciliation initiative, which will require the deployment of teams to the field throughout all prefectures, as well as effective witness protection schemes.

The present situation, however, should not serve as a pretext to rule out the need for placing a truth and reconciliation initiative on the political agenda. The conditions which all truth and reconciliation initiatives should meet, whether in times of war or peace, could, at the same time, help to create a climate which would allow it to function. In fact, if the mandate and the composition at the level of the personnel of a truth and reconciliation initiative are fairly representative and supported by the population, civil society and, to the extent that there are any, by the big political leanings (which, in all circumstances, constitutes an essential condition), is it then excluded that the rebellion (and, *a fortiori*, the army) condones the deployment of a truth and reconciliation initiative? On the side of the armed forces, everything will depend on the genuine political commitment of the current regime. On the side of the armed opposition, this also presupposes the existence of an organised rebellion controlled by one or more structures in command of its activities. If, on the contrary, the rebellion is, above all, made up of an amalgamation of more or less "spontaneous" actions of some unstructured small groups, this hypothesis may be more difficult to materialise.

In this context, it should be reiterated that both the South African Truth and Reconciliation Commission and the International Commission of Inquiry foreseen under the *Arusha* Accords, formed part of a political negotiation process and agreement deemed to represent a large consensus within the diverse leanings of the political class. This in fact also seems to be a prerequisite in the present Rwandan context. It is therefore essential to be able to first identify and then select the national and international actors who should be involved in developing such a non-judicial approach. In an increasingly violent context, this could be very difficult.

e. The unipolar detention of persons accused of violations

In nearly all the cases studied in the two reference works, the situation at the time when a truth and reconciliation initiative was launched, was such that the suspected perpetrators of violations,

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[1542] See, for example the evaluation report prepared by Ian Martin concerning the human rights field operation in Rwanda, annex to the report of the High Commissioner for Human Rights presented at the fifty-second session of the General Assembly (A/52/486/Add.1/Rev.1, 12 November 1997). In the meantime, but more for political than for security related reasons, the day-to-day operations of HRFOR have been suspended since early May 1998 (*Statement by Mary Robinson United Nations High Commissioner for Human Rights*, 9 May 1998, http://www.unhchr.ch/news/dpipress9.htm).

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targeted by the activities of this initiative, were at large, and were even carrying out functions within the public administration, including the armed forces.

This would also have been the context in which the International Commission of Inquiry foreseen under the *Arusha* Accords would have had to operate. In the present situation, this is still the case concerning violations committed by the former armed opposition, i.e. the present government. With regard to the genocide, the initial situation is very different: an unprecedented number of detainees (guilty or innocent) are languishing in prisons and lock-ups.

This situation has important consequences for and repercussions on the establishment and operation of a possible truth and reconciliation initiative:

- First of all, it is extremely urgent, given the presumption of innocence of detainees. In some other cases, the time elapsed between the establishment of a commission of inquiry and the publication of its report and follow-up is extremely long.[1543] This time of operation allows an entire society to cover the process at its own pace. At the political level, it possibly allows a more gradual transition. In the Rwandan context, the urgency of the situation, given the current conditions of detention, would, without any doubt, reduce the time frame available for the launch of such an initiative.

- The initial imbalance (between violations committed by the former regime and those committed by the RPF/RPA) as a consequence of the above-mentioned "qualitative" specificity of genocide, is further increased by this state of affairs. A truth and reconciliation initiative could, in fact, give rise to sanctions (criminal, disciplinary, administrative or other) against some persons who are currently at large and who possibly at present are carrying out some public function and, at the same time, improve the situation of those who are punished *de facto* by being in detention. Consequently, at first sight, the government's interests would not appear to be served by a possible truth and reconciliation initiative which they should accept, or, at least, tolerate. In the medium and long term, the objectives of reconciliation, peace and rehabilitation of the society which the present government has set itself, will require such an approach.

f. The State's responsibility

The suffering of victims of genocide and other human rights violations is irreparable. Nevertheless, a financial compensation (even partial) for loss incurred not only constitutes a right in itself, but at the

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[1543] In Uganda, for example, the Commission of Inquiry into Violations of Human Rights was established on 16 May 1986. Its report was presented on 10 October 1994.

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same time an instrument of reconciliation and of settlement of past scores. It is in this context that one places the responsibility of the State. It is impossible to go into all legal details of the question regarding the responsibility of the State[1544], vis-à-vis the survivors of genocide and other victims of human rights violations within the framework of this dissertation. The author will confine his scrutiny to some of the major themes of the debate regarding the responsibility of the State.

The genocide was perpetrated, by, among others, military and civil servants, who could be held accountable for paying damages and interest to victims. This is also true for violations committed by the RPA after they seized power and installed the new government in July 1994. On the other hand, the State does not seem to have any responsibility for the human rights violations committed by the RPF as an armed opposition. Did the RPF have legal personality during the rebellion? Furthermore, the State also suffered losses and could possibly be a civil claimant against individual perpetrators, both in the context of the genocide, as well as other human rights violations. Similar questions could be asked concerning the responsibility of third states[1545] and the United Nations.[1546] There is no unanimous doctrine concerning the duty of the international community to prevent and combat genocide and the possible responsibilities of the UN and of Belgium with regard to the Rwandan genocide.[1547]

In any event, a minimal responsibility of the third states concerned and the UN would be the hand-over of all documents and all information deemed useful by a possible truth commission.[1548] This could, in fact, indicate the genuine commitment of third States *vis-à-vis* the truth about the events in Rwanda. The refusal of the United States to hand over some 12,000 documents to the international commission in the case of El Salvador sets a highly regrettable precedent.[1549]

[1544] See, in this regard, Verhoeven, J., "Le crime de génocide: originalité et ambiguïté", *Revue Belge de Droit International*, 1991, n° 1, p. 1-26.

[1545] A proposal to extend the competence of the ICTR in this sense, was formulated by the president of Attorneys without Borders; see Cool, B., *Lettre ouverte sur la nécessité d'étendre la compétence du Tribunal International pour le Rwanda*, n.p., 1995, p. 7.

[1546] See, for example, regarding the "*Commission permanente des réclamations*", provided for by the *Accord entre l'ONU et le Gouvernement de la République Rwandaise sur le statut de la Mission des Nations Unies pour l'Assistance au Rwanda du 5 novembre 1993*: Gasana, N., *Génocide contre les Batutsi du Rwanda et crimes contre l'humanité perpétrés à l'encontre d'opposants. Que peut faire la justice internationale?*, Brussels, 15 January 1998, p. 9.

[1547] See, for example, the studies on the responsibilities of different international actors in the case of Rwanda (Senat de Belgique, *Commission d'enquête parlementaire concernant les événements du Rwanda. Rapport. Annexe 6*, 1-611/13, 6 December 1997).

[1548] Hayner, P., "International Guidelines for the Creation and Operation of Truth Commissions: a Preliminary Proposal" in Bassiouni, C. and Morris, M., Accountability for International Crimes, p. 175.

[1549] Huyse, L., *Jonge democratieën en de keuze tussen amnestie, waarheidscommissie en vervolging*, Leuven, 1997, p. 48.

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At the domestic level, reference should be made to the law establishing a National Assistance Fund for needy victims of genocide and massacres committed in Rwanda between October 1, 1990 and December 31, 1994[1550], which is in part based on the fact that "the Government in place during the genocide and massacres, and the administrative institutions played an essential role in the commission of these crimes, and by way of consequence, the obligations of the Rwandan State to help the needy citizens have particularly increased". Especially orphans, widows and disabled persons are intended as beneficiaries of the Fund. As a priority, its assistance should cover education, health and housing needs. The Fund will operate parallel to the judicial approach: "Claiming or receiving compensation from courts does not prevent the Fund to assist needy survivors" (Article 16).

3.9.2.3.4 The truth and reconciliation approach in declarations and ongoing initiatives

The need for a truth and reconciliation process, or at least certain aspects of such an initiative, has been raised on several occasions by different actors and authors in the Rwandan context. At no point, however, does it seem to have found an important enough place on either the national political agenda, or that of the international partners. Here, the author will try to make an undoubtedly incomplete inventory of some declarations, proposals and requests that pursue the same direction as this dissertation. This will induce persons interested in the idea to come together and elaborate and harmonise their various proposals, as well as their follow-up strategy towards the actors concerned.

a. Declarations of cabinet members or senior civil servants

Without much ado, reference can first of all be made to the above-mentioned declaration of the prime minister during the Round Table conference in Geneva in June 1996, when he confirmed the government's intention to establish the commissions foreseen under the *Arusha* Accords, including an International Commission of Inquiry to investigate human rights violations committed during the war. In the logic of the *Arusha* Accords, it seems obvious that the mandate of such a commission should include not only the violations committed by the government, but also those of the former armed opposition, which has become the new government.

The Rwandan vice-president, Major General *Paul Kagame*, does not seem opposed *a priori* to an alternative approach for some categories of detainees:

[1550] Law n° 02/98 of 22/01/1998, Official Gazette of the Republic of Rwanda, 1 February 1998, p. 217.

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> With regard to justice, we have to forge ahead, separate the cases of direct perpetrators of genocide from all the others. For the latter, we have to be innovative: they could contribute to the reconstruction of the country, repair roads, construct houses for the survivors, and cultivate their own fields. Heavy labour could also be a punishment. Presently, the maintenance of 120,000 prisoners costs US$ 20 million per year, for which we receive assistance from the international community! This cannot continue in the long-term: we have to find other solutions; we will explain this to the survivors![1551]

Following an initial mission from the South African Truth and Reconciliation Commission to Kigali in September 1996, a delegation from the Rwandan government, headed by the Minister of Labour and Social Affairs, *Pie Mugabo*, visited South Africa in January 1997. The Minister of Transport and Communication, *Charles Muligande*, and the Prosecutor General of the Supreme Court, were also part of the delegation. The mission, which received financing from Belgium, sought to have Rwanda benefit from the experience of South Africa in the domain of national reconciliation and the compensation of victims of human rights violations.

On the occasion of a conference in Kigali in August 1997, the Minister of Justice, *Faustin Ntezilyayo*, commented on the South African model, by saying that:

> The Truth and Reconciliation Commission on the South African model is an attractive option. I echo the desire to see such a Commission established, but I feel that it is premature. It is hard to say what is the official view. I am not the Prime Minister so I cannot give you the government view. My own view is that we want mechanisms over and above the institutions of justice, something that is in line with social justice, which is indispensable for society. I am far from feeling that a Truth and Reconciliation Commission is not useful. I think that it is necessary, whether it is done through a Unity and Reconciliation Commission or not. It is just as necessary as a Commission for Human Rights. Whichever way one approaches this, anything that helps to bring healing will be helpful. Would a Truth and Reconciliation Commission and a Unity and Reconciliation Commission be incompatible? Justice must have roots. We are not opposed to initiatives from outside the government. Initiatives from within the government and outside the government can come together.[1552]

Reference should also be made to the remarks of the Secretary General of the Ministry of Justice, *Gerald Gahima*, on the occasion of the same conference:

> The Government has previously considered a Truth and Reconciliation commission but has considered it not appropriate for current conditions in the Country. No one has come forward to take responsibility for the genocide. ... However this issue of a Truth and Reconciliation Commission can be revisited. I am not saying that we shall necessarily strictly apply the law because there are such large numbers that it would never be possible to try them all, nor

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[1551] "Les Belges sont les bienvenus au Rwanda", Interview with vice-president Kagame by Colette Braeckman, *Le Soir*, 20 January 1998. Translated by Vandeginste, Truth and Reconciliation Approach, 1998.

[1552] "Comments in the Discussion of the Paper by the Minister of Justice", in Newick Park Initiative.

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> punish them with the sanctions that the law normally applies. We have to take the situation as we find it in reality.[1553]

However, the Secretary General feels that:

> Justice is not just an issue for the Ministry of Justice in this Country: it is an issue for the Cabinet. That is why it is not possible to delegate decisions about justice to a body which is outside the government.

Gahima rightly underlines the differences between the Rwandan and South African contexts:

> There are differences between South Africa and Rwanda in terms of the nature of the crimes, the number of those involved, and the consequences for those who were the targets of the violence.[1554]

b. Declarations of the political opposition

More of a movement than a real political opposition party, the project *Nouvelle Espérance pour le Rwanda* (NOUER or "New Hope for Rwanda") made an appeal to the president and vice-president of Rwanda for the installation of a truth commission:

> At nearly 18 months before the political deadline you set for your transitional government, you should take at least two major initiatives. ... The second would be the establishment of a Truth Commission that would bring out of anonymity all the victims of war crimes, crimes against humanity and the Rwandan genocide from 1 October 1990 to date. This institution, of which the role would be neither criminal nor judicial, would allow to find out the circumstances of the victims' death, tediously dismantle and patiently reconstruct the mechanisms, responsibilities, the ingredients and behaviour which led to the humanitarian catastrophe. This Truth Commission would be all the more necessary as it could dispel the climate and tendency of globalisation of criminal guilt between the ethnic groups.[1555]

The royalist party UNAR, considers the South African approach as one of the instruments to resolve the present war in the country:

> ... the war should be resolved through the political willingness on the part of the Rwandan Patriotic Front (RPF), which should prove its ability to adapt to the process of reconciliation, criminal justice and democracy. Having been one of the pillars of the fight for independence

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[1553] "What is understood by Justice in Rwanda today? What can be justified in Rwanda today by reference to lack of means, technical and human and what cannot. Paper presented by Gerald Gahima, Secretary-General of the Ministry of Justice", in Newick Park Initiative.

[1554] "Points made by Gerald Gahima in response to points raised during discussion of his paper" in Newick Park Initiative.

[1555] NOUER, *Letter to the President and Vice-Président of the Rwandan Republic*, Lausanne, 20 December 1997. The letter is signed by promotors James Gasana et Nkiko Nsengimana. In its "*Propositions pour la relance du processus de réconciliation nationale*", published in May 1996, NOUER had already proposed the establishment of a Truth Commission (NOUER, *Les voies pacifiques de la résolution de la crise politique rwandaise*, Lausanne, 1995, p. 22). Translated by Vandeginste, Truth and Reconciliation Approach, 1998.

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> and national unity, the UNAR party demands that the government in Kigali overcomes its distrust of the Hutu rebels and makes the promotion of justice and reconciliation a historic occasion, following the example of the people of South Africa.[1556]

Some persons have put forward the idea of a collective confession from the Hutu community for the genocide against Tutsis as one of the prerequisites to a process of political negotiation. This proposal is not realistic or opportune, as hundreds of thousands of Hutus were also killed - Which collective confession would be needed for these crimes against humanity? - and many Hutus are not guilty of anything. Moreover, who would be representative of such a diverse community? On the other hand, it seems necessary, in this context, for all movements and political parties to recognise the existence and to unconditionally condemn the genocide. This would not entail any collective responsibility nor would it reduce the gravity of the other crimes against humanity. On this point, *Prunier* has stated that the Resistance Forces for Democracy (*FRD*), holds a special position among the other Hutu opposition movements:

> The originality of the FRD ... has been their strong and clear talk about the genocide and their condemnation of it without hesitation. This position, which seems morally obvious for an outside observer, is in fact very rare in the Hutu community. ... But the FRD straightforward condemnation of the genocide, if it has satisfied foreigners, has not attracted much support within the Hutu community.[1557]

The political platform of the *FRD* also foresees that a truth commission be set up,

> to determine, with the aim of reconciliation based on the truth, the responsibilities of all parties in the Rwandan tragedy. The work and mandate of the Truth Commission are situated outside the judicial process, but constitute a valuable complement to it.[1558]

Reference must also be made to the press release of *Rwanda Pour Tous* on 21 November 1995, in which this association

> reiterates its condemnation of the genocide and all the crimes against humanity which were and still are committed in Rwanda.[1559]

In a letter to the Rwandan president, *Rwanda Pour Tous*

[1556] Rukeba, C., *UNAR. Communiqué de Presse*, 15 décembre 1997. Id.

[1557] Prunier, G., The Rwanda Crisis, p. 372.

[1558] Forces de Resistance pour la Democratie, *Plate-Forme Politique*, Brussels, March 1996, p. 72. Translated by Vandeginste, Truth and Reconciliation Approach, 1998.

[1559] RWANDA POUR TOUS, *Communiqué de Presse*, Brussels, 21 November 1995. Id.

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> appreciates the steps taken by the international community to recognise the Tutsi genocide and to bring suspected perpetrators before the International Tribunal for Rwanda. It is also imperative that an international inquiry be held to classify the crimes committed by the RPF/RPA and its government since October 1990, and especially since April 1994.[1560]

c. Declarations of the international community

The following section presents an attempt to summarise some positions and proposals of governments and intergovernmental actors. The national and international non-governmental organisations will be examined in the subsequent section.

The special envoy of the European Union, *Aldo Ajello*, seems undoubtedly among the proponents of an alternative and complementary non-judicial approach. He draws his inspiration partly from his experience in Mozambique between 1992 and 1994:

> A discussion must be started, together with the Rwandan government, to find a solution, and more than a judiciary solution, as there cannot be solely a judiciary solution to genocide. One good example is the South African Truth and Reconciliation Commission, but there are many other mechanisms in the African tradition and culture. We must combine punishment and forgiveness. We must create and consolidate the culture of forgiveness while we put an end to the culture of impunity. Stopping the sense of impunity would entail that the masterminds of and the instigators of the genocide are punished. The rest, the broad mass of people implicated in the genocide, should be forgiven. In a sense, they themselves can be considered a secondary group of genocide victims, as they were misled by bad leaders.[1561]

Belgium explored the idea of creating a Commission of Reparation for Rwanda, and has, in this context, financed the respective missions and exchanges between the Rwandan authorities and the South African Truth and Reconciliation Commission. Along with Switzerland and the Netherlands, among others, Belgium has also financed the above-mentioned Newick Park Initiative that led to the organisation of a conference on the role of the church in the restoration of justice in Rwanda in Kigali in August 1997.

The first (in 1997, to the General Assembly) and second (in 1998, to the UN Commission on Human Rights) report of the Special Representative of the UN Commission on Human Rights, *Michel Moussali*, only refer to the judicial approach and recommend that the international community

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[1560] Gasana, J., *Lettre au Président de la République Rwandaise*, Brussels, 21 March 1996. Id.

[1561] Ajello, A., "Opening Statement" in Stiftung Wissenschaft Und Politik, *op. cit.*, p.38. See also: CROS, M.F., "La petite idée d'Aldo Ajello pour ramener la paix entre frères ennemis", *La Libre Belgique*, 24 December 1997; Beirlant, B., "Rwanda heeft nood aan cultuur van vergeving", *De Standaard*, 12 January 1998.

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provides technical assistance so that all detainees may obtain legal dossiers in the shortest time possible, and so that the trials against the genocide suspects can take place at a faster pace, without, obviously, violating fair trial standards. No reference is made to a possible complementary non-judicial approach.[1562]

In its resolution of 15 April 1997, the UN Human Rights Commission

> reiterates its request that all states concerned co-operate fully ... to ensure that all those guilty of the crime of genocide, crimes against humanity and other grave violations of human rights committed in Rwanda are brought to justice ... .[1563]

In its resolution of 21 April 1998, the UN Human Rights Commission did not make any reference to a truth and reconciliation initiative either.[1564]

In his 1996 and 1997 reports, the former Special Rapporteur of the UN Commission on Human Rights, *Degni-Ségui*, makes no reference to possible complementary non-judicial approaches to the legal proceedings against presumed perpetrators of genocide and crimes against humanity.[1565] The idea is not mentioned neither in the High Commissioner for Human Rights report to the UN Commission on Human Rights of March 1997[1566] nor in the report to the General Assembly of October 1997[1567], nor in the report to the UN Commission on Human Rights of February 1998.[1568]

d. Private initiatives

In December 1996, a group of 24 Christians from different Rwandan and foreign churches met in *Detmold* (Germany) and published the "*Detmold* Confession". The underlying idea of this initiative was that a reconciliation of the Rwandan people is only possible when its different components recognise the suffering of others, confess their own crimes and ask the victims for pardon. Therefore,

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[1562] Report of the Special Representative of the Commission on Human Rights on the Situation of Human Rights in Rwanda, A/52/522, 22 October 1997 and UN Commission on Human Rights, Report on the situation of human rights in Rwanda submitted by the Special Representative, Mr. Michel Moussali, pursuant to resolution 1997/66, E/CN.4/1998/60, 19 February 1998.

[1563] UN Commission on Human Rights, Situation of human rights in Rwanda, Resolution 1997/66, 15 April 1997, par. 18

[1564] UN Commission on Human Rights, Situation of human rights in Rwanda, Resolution 1998/69, 21 April 1998.

[1565] Documents E/CN.4/1996/68 of 29 January 1996 and E/CN.4/1997/61 of 20 January 1997.

[1566] UN Commission on Human Rights, Report of the High Commissioner for Human Rights on the activities of the Human Rights Field Operation in Rwanda, E/CN.4/1997/52, 17 March 1997.

[1567] UN General Assembly, Report of the United Nations High Commissioner for Human Rights on the Human Rights Field Operation in Rwanda, A/52/486, 16 October 1997.

[1568] UN Commission on Human Rights, Human Rights field operation in Rwanda. Report of the United Nations High *Commissioner for Human Rights*, E/CN.4/1998/61, 19 February 1998.

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the Hutu Christian participants recognised that "their people" ("*les leurs*") had oppressed the Tutsis in different ways since 1959 and confessed to the crime of genocide. The Tutsi Christians asked to be pardoned for the repression and blind revenge which "their people" ("*les leurs*") carried out against the Hutu population, outside the context of the right to self-defence. The Western Christians confessed to having discriminated among persons, to have favoured violence and to have abandoned the Rwandan people on numerous occasions.[1569] The *Detmold* Confession gave rise to numerous reactions.[1570] From the perspective of this dissertation, the *Detmold* Confession has at least this major merit: it shows that the "truth" in the Rwandan context, comprises different elements (and not only genocide against Tutsis for example), for which different actors have a certain responsibility. Each should assume his or her responsibility in order to enable a real reconciliation within society. Despite some interpretations, it seems clear that, by juxtaposing certain violations and responsibilities, the Confession did not at all seek to justify or equate the genocide and other massive human rights violations. However, the truth behind the various atrocities at the centre of this collective confession has not been told: which acts are included, committed when, where and by whom?[1571] As the two reference authors have pointed out, determining the truth constitutes the first step in the entire process. This seems to be the main handicap[1572] of the *Detmold* Confession as an instrument of reconciliation.[1573]

The *Newick Park Initiative*, the international branch of the *Relationships Foundation* has been mentioned several times throughout this chapter. Meetings were held in June 1996, December 1996 and August 1997. The latter focused on the role of the church in the restoration of justice in Rwanda. The participants, in this context,

> took notice of the existence and operation of the Truth and Reconciliation Commission in South Africa and found this experience interesting. They recommend that the churches in

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[1569] The Detmold Confession has been published in *Dialogue*, n° 195, January 1997, p. 58.

[1570] Gasana, J.K.; Nzacahayo, P., *La Confession de Detmold. Une réponse creuse à un problème profond*, Lausanne, July 1997. See also 8 reactions published in *Dialogue*, n° 197, March - April 1997, p. 34-62.

[1571] See also, the comments of René Lemarchand in Stiftung Wissenschaft und Politik, Improving African and International Capabilities, p. 93-95.

[1572] Others are: the Confession seems to isolate the ethnic dimensions of the violent acts committed without indicating how the ethnic group is used as an instrument in a fight for political power. Moreover, it makes no reference to the crimes committed within the same ethnic group: for example, the president of the Interahamwe, Robert Kajuga, was Tutsi. It does not state either that numerous Tutsi civilians survived the Rwandan genocide thanks to a Hutu.

[1573] After the second meeting of the signatories to the Detmold Confession, the clarification was made that "the confession does not generalise culpability in the criminal sense. The latter can only be individual". Declaration published in Chimay on 31 December 1997.

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> Rwanda and the Rwandan State considers the need for, and the possibility of, setting up a similar process in Rwanda.[1574]

Sarkin launched some concrete ideas with regard to the implementation of "this similar process". In order to set up the Commission, he emphasised that it should be established by law. Consequently, this initiative cannot only be limited to the civil society. In order to guarantee its legitimacy towards diverse sections of the population, the composition and appointment of members of the Commission should not be in the hands of the Government. The commissioners should be appointed by a panel made up of a representative of the Secretary General of the UN, the Secretary General of the OAU, the President (of the Commission) of the European Union, the government, the Catholic church, the Anglican church and human rights organisations. The committee should also take a decision concerning the objectives of the commission's tasks, the *ratione temporis*, *ratione loci* and *ratione materiae* mandate. *Sarkin* rightly adds that the international community should allocate important financial resources to the activities of such a commission, in order for it to attain its objectives.[1575]

Within the context of a study concerning conflict management in Central Africa, COPRI (*Copenhagen Peace Research Institute*) published a study on, among other things, the needs of a judicial system in transition.[1576] The study first examines the possible role of customary law, and in the first place, the *gacaca*, in the settlement of past scores and reconciliation, in a context of genocide and crimes against humanity.[1577] According to the author of the study, *Christian Scherrer*, this would, in any event, require that the *gacaca* remains independent of the public administration, but is modified to meet present needs, including the participation of women and youth representatives in the system, which is traditionally monopolised by "wise old men". The forum of the *gacaca* would serve as a basis for the local activities of the truth and reconciliation commissions. In the meantime, a national truth commission would be set up, initially through the establishment of an advisory and consultative body composed of respected independent personalities. COPRI's proposal to develop this project did not receive donor financing. Traditional justice in the form of the *gacaca* may indeed be able to play an extremely important role in grassroots conflict management, especially in cases concerning the ownership of houses, land and cows, including conflicts directly

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[1574] "Déclaration" in Newick Park Initiative.

[1575] Sarkin, J., "Lessons from other Commissions around the World. The Mechanics of a Commission for Rwanda", in Newick Park Initiative.

[1576] Scherrer, C., *Central Africa: Conflict Impact Assessment and Policy Options*, Working Paper Copenhagen Peace Research Institute, n°25, 1997.

[1577] The traditional *gacaca* system can be useful in reconciling the local population as long as it is not manipulated by politicians.

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linked to the events of the genocide. This inspired the drafters of Article 14 d of the Organic Law of 30 August 1996, which only provides for civil compensations by means of an amicable settlement, as a "punishment" for persons in Category four (persons who committed offences against properties).[1578] Traditionally, however, the *gacaca* only played a limited role in criminal matters.[1579] Consequently, the *gacaca* seems poorly placed to determine responsibilities for acts of genocide. All the more so since it is a collective process, one can hardly imagine how one could involve the killers in this traditional justice.[1580] One could also wonder if major changes (such as those proposed by COPRI at the level of the composition of the gacaca) would be compatible with the traditional character of this justice (and therefore, with its popular support).

Attorneys without Borders (ASF), through its project "Justice for All", is one of the most actively involved actors in the present judicial approach. In its annual report for 1997, *ASF* states that there was a considerable reduction in the pace of trials at the end of 1997[1581] and the association adds that "whether it is civil parties or defendants, the parties to the trials suffer, in any case, from the slow pace of proceedings".[1582] ASF concludes, among other things, that

> the total number of persons detained in Rwanda, cannot be tried in a reasonable time frame. Alternative solutions must be put into place so that the judicial power may focus on more serious offences. ... Justice cannot form the only response, but should be placed in a more global political context of prosecution and compensation. The implementation of complementary mediation procedures should be a priority for further study.[1583]

To sum up, throughout the above-mentioned analysis and proposals of truth and reconciliation initiatives, truth telling is seen as a key issue. Discovering this "collective truth" through a truth and

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[1578] According to article 14, in the event that an amicable settlement cannot be found, "the rules pertaining to criminal proceedings and civil actions shall apply. If the accused is sentenced to a term of imprisonment, the sentence is suspended". Some authors have denounced the impunity which property offenders enjoy: see, for example, Nsanzuwera, F.X., *La justice traditionelle rwandaise et la Commission "vérité et réconciliation": pistes de solutions pour que la justice au Rwanda lutte contre l'oubli et cimente la réconciliation nationale*, Brussels, May 1997, p. 6.

[1579] "The gacaca, therefore, deals with minor criminal cases, and decides as if it were cases of civil responsibility". (Reyntjens, F., "Le *gacaca*, ou la justice de gazon au Rwanda", *Politique Africaine*, December 1990, p.34) (Translated by Vandeginste, Truth and Reconciliation Approach, 1998).

[1580] "Our main goal is to have society reconcile with itself. There is no room for the killers in the process," an elderly man in Rusororo said, "I do not think that the 'Gacaca' would have the power and means to arrest them or have them recognise the crimes committed" (Kayigamba, J.B., *Rwanda-Politics: Courtyard Justice Heals the Nation*, IPS, 13 October 1997.)

[1581] In some way, this is also due to an improvement in the competence of magistrates who are becoming increasingly demanding with regard to forms and principles, often causing hearings to be postponed (Avocats Sans Frontieres, *Rapport Annuel 1997*, Brussels, 1998, p. 10).

[1582] Translated by Vandeginste, Truth and Reconciliation Approach, 1998. *ibid.*, p. 6.

[1583] Id., p. 27.

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reconciliation initiative is not only necessary, but can also differ from the "juridical truth" of an exclusively judicial approach. As an example, reference can be made to the presumption of innocence, one of the core fair trial standards in a judicial approach. Even if tens of persons died on a hill, the "juridical truth" of innocence will remain intact as long as the guilt of one or more individual perpetrators has not been established. The judicial approach (whether at the national level or that of the ICTR) may therefore eventually not lead to the establishment of any criminal responsibility for the events which took place on this hill. The non-judicial approach would be totally different: it would be perfectly possible, even without passing judgement on the criminal responsibility of certain individuals, to try and reconstruct the truth surrounding the events and to record them for the collective memory of the nation. In other words: the task and approach of a judicial police inspector could be very different from the activities of a truth commission, even if they are dealing with the same reality. This "non-judicial" truth, on condition that it is determined by a respectable and independent organisation, is not only a prerequisite for reconciliation and the re-establishment of social harmony, but is also a protection against all forms of revisionism and/or negationism,[1584] thus a way of reconstructing a failed State.

However, it should be pointed out that even if a number of Rwandans, Hutus and Tutsis alike, support the truth and reconciliation philosophy, it is not clear who would initiate the process and how long it would last, especially since the fear persists among both groups. The question here pertains not only to a mediator but also to a facilitator/instigator, someone whose equipment, money, human resources and diplomacy could help Hutus and Tutsis, northerners and southerners, to come together to establish lasting peace and reconstruct their society.

There is no question that the international community can play an important role in this regard. There may be some truth in the argument by American officials that they and other outsiders have little influence on what goes on in this part of the world,[1585] but it is also true that governments outside Africa have considerable leverage which they could have applied against Rwanda and the rest of Africa. The United States, for example, buys almost all the coffee produced by Rwanda and the country would be bankrupt without foreign aid from Belgium, Britain, Canada, Denmark, France, Germany, Japan, Norway, Sweden, the United States, and the United Nations. Perhaps a coffee boycott or the withdrawal of aid would not have stopped the slaughter in the country, but this weapon has never been used.

[1584] African Rights, *op. cit.*, p. 1164.

[1585] Meisler, S., 'Flashback: Violence and Unrest in Central Africa', *The Atlantic Monthly*, September 1973.

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Those industrialised countries have now made foreign aid conditional upon multi-party democracy and respect for human rights in recipient countries. This is a welcome departure from previous practice when the United States and other Western countries backed African despots such as *Mobutu* of Zaïre, *Arap Moi* of Kenya, and *Siad Barre* of Somalia in order to contain the spread of Soviet influence in Africa.[1586] However, the continuous support to the oppressive and absolute government in Rwanda is questionable.

The industrialised countries could also have put pressure on the other African countries to face the problem of Rwanda and other countries. They could have, for example, refused to support all African resolutions on Southern Africa in the United Nations unless these resolutions also condemned the disaster in Burundi and Rwanda. Perhaps this would only have infuriated Africa. But it might also have shamed Africa into dealing with its problems. At the least, it would have exposed African hypocrisy.

There is the question of whether countries like the United States have the moral right to remain silent while all the killing goes on. Perhaps it is true that condemnation would have been futile in Rwanda in 1994. But no one knows for sure. All that is known is that, while everyone kept quiet, more than a hundred thousand people died. Keeping quiet obviously has not saved anyone. Perhaps shouting might have.

The most important course remaining for the UN is the implementation of a long-term special mission to Rwanda with regard to reconciliation and reconstruction as long as resources are not wasted and the mission is not one sided as has been the case so far with regard to the UNAMIR and the ICTR. One of the duties of the UN Organisation being the maintenance of peace and security in the world, the world organisation can, for example, in accordance with Chapter VII of the UN Charter, work out a 15-year plan in which it can play an active role. During this period, Rwandans would have enough time and support for truth telling and reconciliation. As the problem pertains, *inter alia*, to positions in government, the judiciary, the army and parastatals, high ranking positions in these institutions should at least be occupied by UN personnel, at least during the first years, as long as reconciliation is pursued. Particularly, however, the army should be entirely UN blue helmets who would withdraw little by little until the end of the mission. Fifteen years is a sufficient period to form a national army. It

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[1586] A lot has been written on this subject. See, e.g.: Pamela Constable, Africa's Shift to Democracy Forcing Change in US Policies, Boston Globe, Nov. 11, 1991 at 1; Paul Chintowa, Development: Sweden Ties Aid to Democracy, Inter Press Service, April 3, 1992; Barbara McDougall, Defending Human Rights, Ottawa Citizen, Feb. 26, 1992, at 10; Lynda Chalker, Giving Aid to the Third World, With Strings Attached, Sunday Times (London), Aug. 18, 1991.

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is also sufficient for Rwandans to agree on the meaning of democracy in their country. During this period, a new generation of Rwandans can be provided with formal education and education on democracy, human rights and the rule of law without exclusion. It is especially on this new generation that one can place great hope for the future of the country, as the current one has failed to build a reconciled and democratic society. A Constitution can also be studied, drafted and agreed upon. Great emphasis should be laid on ethnic and regional problems, a popular government, a constituent assembly, the electoral system, prevention of tyranny and safeguarding of rights, defence of public interests, establishment of a liberal society with equal chances in the management of resources, the ombudsman institution, directive principles of State policy, an independent human rights commission, and a legal aid department. The following sections are designed to be provocative rather than a watertight piece of UN organisation. They will therefore not examine the steps to be taken by the UN to set up the mission in details, but rather analyse those means and institutions that can be set up for the process of reconciliation and reconstruction during and after the UN mission.

3.9.3 Understanding democracy

3.9.3.1 The fundamental idea

Any legitimate attempt to place checks on apparent majority power depends on finding a new way to think about ends and means of democratic government. Such a basis can be found in a very old way of thinking about democracy; this approach is reflected in the writings of the authors of the American Constitution. This dissertation does not argue that the specific institutional arrangements of the United States Constitution are applicable to Rwanda. Rather, the way the framers of that document thought about self-government and representative democracy is extremely useful for solving the problems just set forth.

In 1787, *James Madison, Alexander Hamilton* and *John Jay*, writing under the pen name of "*Publius*", composed an impressive series of essays designed to gain popular acceptance of the proposed Constitution. As they wrote, *Publius* encountered some of the same fundamental problems that confront Rwanda today. Relatively speaking the United States of the 1780s was a developing country ridden by significant division as landowners, farmers, commercial traders, merchants and rural peasants struggled for power and control over the destiny of the new nation. The chief dimensions of this struggle were the appropriate amount of mass popular control over government, the relative power of the central versus regional governments, and fundamental questions of

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economy such as the rights of contract, taxation and debt. In essence, *Publius* confronted the competing tasks of ensuring popular rule, checking its excesses and preventing contending groups from depriving others of their rights. Yet this was no mere exercise in conflict resolution. They wanted to do all these things and create a government strong enough to provide for the pressing needs of a developing and modernising country. At their most basic level (and without pushing the analogy too far), these competing demands sound very similar to the fundamental, essential tasks confronting Rwanda's leaders.

The author's interest here is not with the particularities of *Publius*' arguments, but rather with the fundamental understanding of democracy embodied in their thinking. Most importantly, this basic understanding[1587] offers a legitimate rationale for placing checks on majority rule. In addition, such an understanding of democracy may provide other benefits because it implies a certain institutional arrangement that could help limit violence, protect liberty, and forward the common interests of all Rwandans.

Publius proceeded from the fundamental assumption that human behaviour was motivated by both reason and passion. Yet human nature had to be confronted as it was because any attempts at amelioration entailed an unthinkable violation of individual liberty.[1588] Thus, the challenge was to ensure that human reason, and not passion, would "not conform to the dictates of reason and justice without constraint".[1589] Therefore, passion (or to use its modern equivalent- irrationality) had to be controlled and regulated by government in order to prevent people from violating each other's rights.[1590] Yet *Publius* saw all humans as flawed, not just "the masses". All people were corruptible, especially by power. Thus, human nature also meant that government itself had to be controlled to prevent it from oppressing citizens.

Consequently, aristocracy, monarchy and oligarchy were dangerous forms of government because they placed undue faith and power in the hands of the few. This made popular control over government an absolute necessity.[1591] Yet direct majoritarian democracy was dangerous because it placed undue faith and power in the hands of the many. Therefore, popular control over government needed to co-exist with checks on popular influence and guarantees of individual freedom. As

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[1587] In contrast to Westminster parliamentary or consociational approaches.

[1588] Federalist, #10.

[1589] Federalist, #15.

[1590] Federalist, #49.

[1591] Federalist, #51.

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Publius noted in that memorable phrase: "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary... . You must first enable the government to control the governed; and in the next place oblige it to control itself."[1592]

The main threat to liberty and the common good was seen to arise from groups within society called "factions". *Publius* saw factions as any group motivated by passion or interest which attempted to influence policy in a way that was "adverse to the rights of other citizens, or to the permanent and aggregate interests of the community".[1593] Factions were unavoidable and resulted from natural differences in interest, reason and ability. Different opinions and unequal accumulation of wealth and property created division and animosity, and rendered people "much more disposed to vex and oppress each other than to co-operate for their common good".[1594] Yet destroying the cause of factions entailed either the equalisation of all people and/or the destruction of liberty. Instead, *Publius* decided to regulate the effects of factions.[1595]

Finally, while the authors of the Constitution were interested in securing popular rule and individual rights, they also envisioned a government which ruled, not in any group's particular interest, but in the common or public interest. They were convinced that it was possible to create a government that would enact the best policies for the nation as a whole. Truth was not relative, nor unknowable, to these founders. Far from it, it was truth and reason which dictated that people had certain inalienable rights in the first place.

But the best policies and the best government did not result from the aggregation of individual or group preferences. Rather, they emanated from dialogue and reflection. And the time and space necessary for such reflection was not secured by a democratic government understood only as a means for majorities to translate their will into law. In a democracy conceived as such, "the public good is disregarded in the conflict of rival parties, and measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority."[1596]

[1592] Federalist, #51.

[1593] Federalist, #10.

[1594] Federalist, #10.

[1595] Federalist, #10.

[1596] Federalist, #10.

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Thus, democracy had to be more than a resolution of the clash of interests and desire. Popular self-government demanded "that the deliberate sense of the community should govern the conduct of those to whom they entrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion; or to every transient impulse which the people may receive from the arts of men, who flatter their prejudices to betray their interests".[1597]

Accordingly, *Publius* understood democracy as an open, popular system that controlled government and protected the fundamental rights of all individuals. Such an understanding stands in sharp contrast to a democracy conceived only as a mechanism to reflect the current balance of power among contending groups and translate the will of the stronger group into law. Seen through *Publius'* eyes, democracy has more to do with how people govern themselves according to the dictates of reason than it does with translating majority will into public policy. Yet it also stands in contrast to consociational approaches which protect the rights of groups as defined by ascriptive traits.[1598]

How do we govern ourselves within the limits dictated by reason? *Publius'* task was to constitute an arrangement which rested on popular self-government, which protected individuals from oppression by others as well as by the government, and yet which created a government strong enough and effective enough to produce the best national policy possible. They needed to combine in government the energy and wisdom necessary to complete great projects and rule in the public interest, with the necessity of securing individual liberty and popular rule.[1599]

3.9.3.2 The basis

Publius' understanding of democracy was based fundamentally on the principle that all office holders should be subject to direct, or at least popular, election. As opposed to majoritarian conceptions, voting and elections were seen as a method of controlling officials – not of creating policy mandates or policy demands. It was necessary that officials were popularly selected, and it was sufficient that

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[1597] Federalist, #71.

[1598] Consociational democracy is built on the principle of executive power-sharing and a certain degree of self-administration for each group, whether they live together or separately. This notion which stands among the many variations in democratic experiences which seek to accommodate a degree of pluralism has been developed in recent political science by aren't Lijphart. It is a form of power-sharing through a multiple balance of power among the segments of a plural society which, according to Lijphart, allow for decision-making by the "grand collation method". Lijphart sees it as "an alternative to the majoritarian type of democracy, and more suitable for good government in plural societies divided by ethnic, linguistic, religious or cultural differences, where the groups are clearly identifiable". Lijphart, A., "Majority Rule versus Democracy in Deeply Divided Societies", *in Politicon* 4 (2), 1977.

[1599] Federalist, #37.

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this was done on a regular basis with fixed terms of office.[1600] Thus, election results did not have to "mean" anything in terms of giving policy guidance or creating a mandate.[1601] It is on this point, especially, that *Publius*' understanding of democracy is more in accordance with logic and reality than any other conception.

Yet once sovereignty and control were located in people, how was factional tyranny to be prevented? First, minority factions which may from time to time control government would be prevented from infringing on others' rights by the threat of being voted out of office. Minority factions within society would be prevented from such behaviour by government action.

Yet what happens when a majority faction controls government and declines to use State power to protect minorities against abuse from other elements in society? More importantly, what happens if that majority decides to use the State itself to tyrannise? Indeed, *Publius* saw the prevention of tyranny by majority faction as the more demanding task. For when "the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature, where the weaker individual is not secured against the violence of the stronger".[1602]

To prevent this, *Publius* relied on an extended, diverse society, which allowed the multiplication and proliferation of interests and sects to make it more difficult for any one faction to dominate over the rest or infringe on their rights. They also devised a number of institutional arrangements to splinter and break majority factions. In order to capture government completely, potential majorities were forced to prevail vertically over the existing federal nature of the political system. They also were forced to prevail horizontally because independent and separate powers were assigned to the legislative, judicial and executive branches of the government. Finally, they were forced to prevail over time because the elections of the various branches of government were staggered so that any numerical majority would have to dominate over a series of elections in order to capture the government. These features were intended to: make "an unjust combination of a majority of the whole very improbable if not impracticable"; make it less probable that any majority would "have a common motive to invade the rights of other citizens"; and, if that failed, to render majorities unable to oppress.[1603]

[1600] Federalist, #39.

[1601] Riker, W., Liberalism against Populism, San Francisco: WH Freeman, 1982, Chapt. 10.

[1602] Federalist, #51.

[1603] Federalist, #10 and #51.

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Yet besides preventing tyranny, many of these arrangements were also designed to ensure consideration of the public, or common, interest. Institutions such as the Senate and Presidency were assigned large, diverse constituencies that would force them to pursue the common interest rather than that of particular interests that might dominate smaller constituencies. In addition, these institutions were given important checks on the House of Representatives which, with smaller and more numerous constituencies, was expected to be more prone to parochial concerns. Furthermore, while powers were separated between branches of the national government, the legislative, executive and judiciary, functions were partially combined among the branches to foster co-operation and compromise.

Yet separation of powers, staggered elections and federalism were not intended to preclude popular influence over government. Rather they were designed to ensure that such influence would be more deliberate and considered rather than based on momentary passion and whim. These institutions were intended to: "refine and enlarge the public views by passing them through the medium of a chosen body of citizens",[1604] and enable those officials to "withstand the temporary delusion" of an apparent public opinion that was at variance with the public interest and to create the time and opportunity "for more sedate reflection".[1605]

3.9.3.3 Application and implications to Rwanda

To restate, the prime relevance for Rwanda of *Publius*'s understanding of democracy is the legitimate rationale that it offers for the necessary task of limiting majority will in democratic government. Thus, *Publius*, offers a way out of the dangerous traps laid by the myths of majoritarianism. This understanding also achieves this without assigning veto powers to ascriptively defined minority groups. Moreover, such an understanding of democracy may provide additional benefits for Rwanda by ensuring individual and group rights, as well as enabling government to address pressing social problems.

What would be the implications of such an alternative understanding of democracy if it was ever embraced by relevant constitutional planners and negotiators?

3.9.3.3.1 Non-ethnicity and non-regionalism

First of all, understanding democracy as an open system rather than as majority rule would allow

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[1604] Federalist, #10.

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Rwanda to abandon the potentially ethnic definition of majority rule. It would shift the criterion of legitimacy for a future government away from the composition of the ruling party to the process by which it can be selected. Limitations on the majority party in government would not result from allocating vetoes to minority groups defined by ethnicity. Rather, the Constitution would structure incentives for groups to coalesce naturally on issue to issue to protect their vital interests.

The polarisation of ethnic groups together with reflexes of automatic solidarity between individuals on ethnic basis, the use of the 1994 genocide by the RPF regime as a political trump card to marginalise Hutus and to savagely repress them in case of resistance, the miserable conditions of life of refugees outside Rwanda, while their properties are occupied by dignitaries of the government and army officers, maintain a climate of hatred and rejection and could lead to the repetition of tragedies in the future. Understanding and practising democracy as an open system, Hutus and Tutsis can accept each other in their multiple similarities and their differences and can develop a culture of tolerance, open-mindedness, love and mutual acceptance. The adoption of democracy as an open system would result in pacific cohabitation in the strict respect of equality and without any hegemonic pretension of one group over the other on the basis of worn historic considerations and cultural, military or numerical superiority. In this regard and in conformity with the Constitution agreed upon, legislation would be enacted outlawing ethnic and regional behaviours, as is the case in "anti-racism" laws existing in other countries such as South Africa and the United States of America. At local levels, mixed groups of mature, respected Hutus and Tutsis can be set up to address certain problems of land reform and reduce the conflict producing discursive practices.

A non-ethnically-based and non-absolute political system would, therefore, be established. In view of healing the evils afflicting the Rwandan society it is important to fix pluralism into political practices. Pluralism must transcend the current conception of multipartyism to encompass all the spheres of civil society in the form of multiplicity of trade unions, religious, socio-professional associations, peasants' organisations, youth and women's organisations, etc. Authoritarian attempts to fit people into one political straitjacket would not be revived.

The Constitution and ordinary laws would recognise the existence of opposition not only as a safeguard but also as a guarantee of a possibility of alternation in the management of public affairs. Clear statutes would confer honour and privileges on the opposition and their representatives.

[1605] Federalist, #71.

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As regards the army, instead of being in the pay of one ethnic group, one region or one oligarchy, it would have as a mission, the defence and the protection of the integrity of the country and the population. The history of violence has led to great fear of the opposite ethnic group. The Tutsis refuse to give up their control of the army because they see it as a form of security against genocide. The Hutus cannot imagine a stable democracy as long as the Tutsis control the army. Concretely, there is need of a national army composed of Hutus, Tutsis and women recruited from all the communes of the country. Its relative composition would be inspired by criteria applied in democratic regimes for representation in parliament. It is not impossible to determine minima and maxima for each ethnic group, each sex and each region. However, the principle of merit and competence should be of prime importance in the process of selection.

The gendarmerie and the police would be decentralised. Recruited in the same way as soldiers, the gendarmes and police officers have to prevent crime, ensure that people are safe, and ensure that people are able to use their democratic rights freely and peacefully. They will work with the community to decide what the policing needs of the community are.

Independent groups outside the police would investigate complaints about the way the police work or behave. If a member of the police has a complaint, s/he could ask an Ombudsman[1606] to solve the problem.

Members of the police and the gendarmerie would be allowed to join associations that serve their interests.

In any case, as regards the number of people in the armed forces, the gendarmerie and the police should correspond to the economic possibilities of the country. An oversized and budget-consuming army like the one set up by the end of the *Habyarimana* regime or by the RPF is characteristic of an oppressive regime which does not command the trust of the population.

The weight of the military in public affairs other than the defence and protection of the territory and the population would be suppressed. The primacy of civil power over armed forces would be guaranteed.

Moreover, a national security council dominated by civilians would be established to deal with orientations and important questions regarding peace and security. It would be responsible for

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[1606] See infra 3.8.3.3.8 The Ombudsman Institution.

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collecting information about anything that threatens Rwanda's peace and security. The people would have a right to this information as long as it does not threaten the country's security. Parliament would watch over the national security council, which must follow the democratic Constitution and the bill of rights. The national security council would respect the rights of all people to take part in political life, as long as they did not break the law.

Understanding democracy as an open system would also solve the regionalism problem. It has already been indicated that the ruling elite made use of their region of origin to marginalise others and hold power, wealth and privileges in monopoly. To prevent such a situation in the future, the management of public affairs could be decentralised to the benefit of regions, local communities and associations. Important domains such as education, agriculture, public health, tourism, national and regional development would fall within the competence of regions but, of course, not be divorced from the larger vision of national and sub-regional development. "A truly decentralised democracy is the only one able to prevent the totalitarian temptation of rulers to want running the whole show to their own profit, that of their families or region".[1607]

The system of local government should not only assert non-ethnicism, but also non-sexism and will actively build non-ethnicism and non-sexism into processes designed to counter decades of discriminatory government. Mechanisms could be built into the system to enable women to participate in decision-making and administrative structures at all levels of regional and local government. In this regard, programmes would be designed and launched to equip women with skills enabling them to do so. Special attention has to be paid to the rural areas where the greater number of women is located.

Democratic local government means more than just having the right to vote in a local election. It also includes facilitating the creation of a strong, independent civil society, a high degree of accountability, transparency and the right to participate in decision-making processes which affect communities between elections.

However, participation and accountability are meaningless if people do not have access to information. The public disclosure of all information pertaining to any policy, decision or activity for which any local authority is responsible would be guaranteed. In particular, meetings of the local government council and of council organs would, in principle, be open to the public.

[1607]Kazadi, E., Instability in the Great Lakes Region, Nairobi: CRIN, 1993, p. 13.

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The independent office of the Ombudsman is to be created to investigate allegations of partisanship in the allocation of resources, maladministration and corruption.

3.9.3.3.2 A popular government

Secondly, the institutional limits to majority power implied by this new understanding should not be seen as checks on Hutu aspirations or on their legitimate civil rights and liberties. They should rather be seen as a check on the potential for any political group or party to act as if it were the sole authentic representative of those aspirations. With the advent of free and fair elections based on universal suffrage, Hutus should and will come to govern Rwanda; they constitute the bulk of the sovereign electorate and will ultimately comprise the majority of office-holders. This is the fundamental essence of popular self-government. But neither Hutus, nor Tutsis should be conceptually seen, or actually allowed, to rule as a corporate identity. Even though majority rule is a myth, parties and governments will (consciously or unconsciously) use this myth to pass themselves off as the true oracle of the Voice of the People. Cloaked in the majoritarian mantle, they would accrue unwarranted power in the absence of constitutional checks.

3.9.3.3.3 A constituent assembly

Demands for a constituent assembly to negotiate and frame the new Constitution have been rationalised largely in majoritarian rhetoric. Such demands usually call for a national, unitary election based on proportional representation.[1608] The basic assumption is that such an election will produce an assembly that is a true reflection of public opinion on a new Constitution. They are also based on the assumption that this will be a more legitimate and fair process than an all-party conference consisting of elites sent by contending groups and parties. Presumably elected delegates would produce a truer picture of public opinion than the elite selected by contending groups.

Yet the problems of using elections to reflect public opinion outlined earlier mean there is no reason to assume that an elected constituent assembly would truly reflect popular will. Nor is there reason to assume that it would significantly enhance popular power in the making of the Constitution. In addition, those voted into the assembly would still be elites; and they would probably be many of the same ones who would sit around the bargaining table if they were sent as group representatives. The only difference would be that their proportional numbers – and hence political strength - would

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[1608] See for example, RDR, Plateforme Idéologique du Rassemblement pour le Retour des Refugiés et la Démocratie au Rwanda, Paris, 23 August 1998.

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be different. This reveals something about the nature of many of the demands for an elected constituent assembly: they may be proposed as much as a means of increasing the constitutional bargaining strength of some groups as to increase actual popular influence. They may be based as much on calculations of political power as on (albeit misguided) principle.

Yet one might argue that even if constituent elections could not reveal popular will, they would at least make people feel better and more efficacious about the system; that, in turn, would increase the legitimacy of the negotiators and the final product of those negotiations. This is a legitimate concern. Yet these goals could as easily be accomplished through other methods such as a *post-hoc* national referendum on the proposed Constitution, or elections within each constituency of the delegates sent to the all-party conference or of their negotiating platforms. In many respects, accountability to one's own constituency is how many reformers legitimate the idea of a fully sovereign interim government. Thus, if such means could legitimate a non-elected interim government, they should be sufficient for the all-party conference.

Finally, a constituent assembly may pose a threat to the very real and legitimate need to limit apparent majority influence discussed earlier. A constituent assembly elected on the premise of majority rule and operating on the basis of majority rule in internal votes and resolutions would mean that the numerical majority in the assembly would be entrusted with placing potential limits on majority power and guaranteeing minority rights. There would be strong incentives within the assembly to resist placing limits on itself.

The involvement of the international community is obvious in the establishment of a consistent constituent assembly. Undoubtedly, the Namibian experience would, *mutatis mutandis*, provide great incentives to find a solution.[1609]

The manner and degree of international involvement in making peace in Namibia, in providing clear guidelines, in monitoring the actual transition and the first election, and in influencing the writing of the Constitution, directly contributed to the successes achieved in 1989-90. Transition to peace and independence was preceded by a long struggle and in 1976 the Security Council adopted Resolution 385 introducing the important new concept "that in order that the people of Namibia be enabled to freely determine their own future, it is imperative that free elections under the supervision and control of the United Nations be held for the whole of Namibia as one political entity".

[1609] For details about statehood in Namibia, see particularly Erasmus, G., The Constitution: Its Impact on Namibian Statehood and Politics, Working paper, 1999.

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Security Council Resolution 435, which eventually became the basis for an elaborate international plan for the solution of the Namibian problem, was adopted in 1978. It provided for, *inter alia*, the establishment of the UN Transition Assistance Group (UNTAG) "to ensure the early independence of Namibia through free and fair elections under the supervision and control of the United Nations". It took several more years of negotiations and confidence building before this resolution was eventually implemented in 1989.[1610]

The elections for the Constituent Assembly and the drafting of the Namibian Constitution became part of the international settlement plan. It is important to realise that the international plan gained an important element when it was decided to determine the basic content of Namibia's Constitution in advance.[1611] Constitution-making became part of an international peace-making operation. This happened through the adoption in the Security Council of another important document in July 1982, namely the "Principles concerning the Constituent Assembly and the Constitution for an independent Namibia". This document introduced two sets of important conditions: the rules and procedures for the election, under UN supervision, of the Constituent Assembly; and several Constitutional Principles determining the content of the Constitution and the nature of the future political dispensation in Namibia.[1612]

One of the most obvious explanations for the basic features of the Namibian Constitution and its liberal-democratic values lies in the framework that the Constitutional Principles constituted and

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[1610] The withdrawal of Cuban soldiers, a condition on which South Africa insisted, removed a final hurdle. The international political climate and the global picture also started to change dramatically with the cold war coming to an end. This impacted quite directly on the regional security picture as viewed from Pretoria. For an excellent account of the politics behind the scenes, see Robin Renwick *Unconventional Diplomacy in Southern Africa* Macmillan London 1997, p. 127-135. Renwick was the British ambassador in Pretoria during this period.

[1611] Erasmus, The Constitution: Its Impact on Namibian Statehood and Politics, p. 3.

[1612] The full text is to be found in Security Council Document S/15287 of 12 July 1982. The principles therein provided for a unitary, sovereign and democratic State; a supreme and entrenched Constitution; parliamentary democracy, separation of powers, judicial independence and constitutional review, regular and "genuine elections"; an electoral system based on universal, adult franchise, a secret ballot, and proportional representation; an enforceable and comprehensive bill of rights; the outlawing of retrospective criminal offences; a balanced public service, police and defence service, and fair administration; and elected local and/or regional councils. With the implementation of these principles a unique process unfolded and it meant that Namibians actually did not enjoy a completely free hand in writing their own Constitution. *For a discussion of the meaning and significance of these principles, see M Wiechers "Namibia: The 1982 Constitutional Principles and their Legal Significance" in Namibia: Constitutional and International Legal Issues Unisa 1991, p. 1-21.* The Constituent Assembly, consisting of 72 members, was elected at the end of 1989. It now had to draft and adopt, with a two-thirds majority, the Constitution. No single party gained this majority. SWAPO had 41 members, the DTA 21, the UDF with 4, the ANC with 3 and the NPF, FCN and NNF with one member each. What followed was a remarkable process of compromise and reconciliation. This process has been described in several publications (*see inter alia Van Wyk, Schmidt-Jortzig, Wiechers, Szasz 44 and Erasmus, "Die Grondwet van Namibië" Stellenbosch Law Review Vol 3, 1990 277)* and the outcome was a document which was accepted as fully reflecting the previously adopted Constitutional Principles.

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which could not be deviated from. Namibia had to become independent in terms of a pre-ordained international scheme. This was not a typical decolonisation process with a departing colonial power emancipating its colony, often in haste and without sufficient preparation. The arrival of independence was a joyous occasion, but also reflected pragmatism. It was nationhood through a "strong Constitution", delivered under international surveillance, without one dominant player completely controlling the process, and without military conquest.[1613]

There is no reason to fear that the liberal-democratic values of the Constitution would be foreign to Rwandans and that the Constitution would not last because of the great influence of foreign powers in the process. It is true that the blueprint of Constitutional Principles in Namibia had originally been drafted by the "Western Contact Group" consisting of Canada, France, Germany, Great Britain and the USA. The Namibian parties did, however, accept these principles as the framework for gaining their independence. During the 15 years of the UN mission in Rwanda, democracy would not arrive as a sudden and unexpected development. The parties' own ideas would be refined over time. This can happen in both the internal and exile groups.[1614] Besides, refugees can return home and play politics there since security would be guaranteed after Tutsi and Hutu armies are disarmed. One of the effects of the UN Mission during the 15 years would be the change of political conditions and the general atmosphere. This would result in the disappearance of oppressive stratagems and would contribute to new initiatives and progress. Therefore, the Constitutional Principles will not be a sudden and completely foreign implant as the subsequent Rwandan leaders are to be associated to their elaboration, thoroughly debate and understand them in order to write them into their Constitution.

The most important contribution of the constitutional principles would probably be their legitimating effect on the compromises to be reached by opponents and the face-saving that this would allow. In Namibia, the international community had always been called upon by SWAPO and other movements to bring about change. The same has been done by the Rwandan newly born opposition groups such as the RDR, FRD, and UNAR. Once the international community responds to the call and establishes the UN mission and the Constitutional Principles are part of the deal, it would be

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[1613] The actual transition was quite peaceful. Once the crisis caused by the SWAPO invasion of 1 April 1989 was defused all parties respected the international monitoring. Some incidents of assassination and reactionary terror happened early on but ceased soon.

[1614] Van Wyk, "The Making of the Namibian Constitution: lessons for Africa" 1991 CILSA Vol. XXIV 342.

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quite difficult to reject them as being too accommodating or "liberal". These Principles would be "part and pared of the reconstruction deal".[1615]

As has been the case in Namibia, the Constitutional Principles should not be viewed as only focussing on the content of a constitutional document. They should be the pinnacle of a larger process, backed up by international machinery of considerable resolve and commitment. The process should aim, *inter alia*, at bringing lasting peace, democracy, human rights and the rule of law to Rwanda. These principles also would provide some comfort to the smaller parties because they would create a system of limited government. A future under the rule of a given political party thus would become less uncertain as far as they are concerned. The fears about a repetition of another African failure would at least be formally addressed.[1616]

3.9.3.3.4 The electoral system

As free and fair elections have never taken place in Rwanda, this new understanding of democracy would also allow Rwandans to rethink the function of elections. As noted previously, majorities cannot logically rule as a corporate body. Officials may govern by the good grace of the electorate, but they do not represent any popular or majority will. *Publius*' view of elections offers an appropriate solution. Elections should be designed as a way to control officials and guard against their tyrannical behaviour, not as a method to reveal or measure policy preferences.[1617] Thus, rather than allowing a victorious party to rule on the basis of a mythical electoral "mandate" and itself pick the date at which it will next stand for election, officials should have fixed terms and be subjected to frequent elections. If the next election is the relevant horizon for leaders, that horizon needs to be visible.

Furthermore, the tradition of disciplined parties offering supposedly distinct and internally consistent policy platforms to the electorate also rests on the myth of the electoral mandate. But the main function of a new electoral system would shift towards one of controlling the individuals who make and execute public policy and away from creating the bases for a party to reflect and articulate popular will. Hence, a new electoral system should investigate ways to create more freedom for candidates to forward their own ideas and stand on their own accomplishments and integrity, and be less bound by rigid party doctrine.

[1615] For a comparative approach, see Erasmus, The Constitution: Its Impact on Namibian Statehood and Politics, p. 5.

[1616] Compare to Mudge, in Weiland and Braham (eds) *The Namibian Peace Process: Implications and Lessons for the Future*, Arnold Bergstraesser Institut, Freiburg, 1992, p. 166.

[1617] Riker, Ch. 10.

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And as the function of elections might be re-conceptualised, the apparent legitimacy granted to certain groups by the grassroots consultation process would also need to be reassessed. While this appears to be a healthy component of a democratic system, consultation should be recognised for what it is: the approval of activist minorities, especially Tutsis, and not the blessings of "the people" at large. This means, *inter alia,* that the president-for-life syndrome that has characterized the country is correctly perceived to be incompatible with democratic practice. Democracy in Rwanda will benefit from turn-over in presidential tenure to demonstrate that this position in particular is not established for particular individuals, as Rwandan leaders in the one-party ethnically-based State believed. Also, laws should be enacted providing for benefits for former heads of State. Thus, the incumbent has the assurance that he will not become economically desperate.

3.9.3.3.5 Preventing tyranny and safeguarding rights

Such an understanding of democracy would also prevent a government from acting as if there were no real differences of interest and opinion among Hutus (as well as among Tutsis). One of the great tragedies of both the MRND and the RPF has been that they forced the people to ignore or explain away any differences of taste or political preference that exist among them. They assumed that the recognition of any difference was a betrayal of 'national unity'.

Recognition of these differences would, in turn, entail an unqualified right of political association and freedom of speech in order to allow the proliferation and multiplication of groups to represent any natural interests or groupings of opinion and preference which may exist. Yet this does not mean that Tutsis should be granted special protection as an ethnic group. However, the Constitution would have to create incentives for them to form and protect vital interests.[1618] This means multiple points of access to government (especially the legislature) to influence public policy; it means recourse to the courts to prevent infringement of fundamental rights.[1619]

[1618] The Hutu government has not been noted for its protection of minority political views, and the RPF has proved committed to stratagems aimed at limiting opposition of rival groups and parties.

[1619] The power sharing formula suggested in the Arusha Peace Accord cannot work and coalition government in Rwanda indeed does not have a good record. It has been a tried and failed plan that has ended in genocide, self-proclaimed government, and destabilisation of the population. As seen, it was introduced in the early 1990s owing to internationally sponsored negotiations (*Arusha 1992-3. See Chapter two, section I)* and because 'democratization' was one of the key terms of international aid. Part of the reason for the failure is that there is so little power and resources to share. There must be something to distribute and an ability to create a viable middle class and this is missing in Rwanda. The country has the highest percentage of disturbed, overpopulated land in Africa. Discounting uninhabitable areas like parks and lakes, the population density within Rwanda exceeds 400 persons per square kilometre. *UN, United Nations and Rwanda,* 1993-1996, Document 20, at 209. In recent times, the country has been numbered among the poorest ten countries in the world. *Griggs, R., The Great Lakes Conflict: Strategies for Building long-term Peace, Center for World Indigenous Studies 4 World Atlas, 1997.* Today, it relies almost entirely on international aid for sustenance and the per

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Such a conception would also require checks against factional tyranny. Like any other country, Rwanda is chock-full of factions. To take two recent examples: the *UNAR's* proposals for a new Constitution and an interim government epitomise the unabashed intention to hold on to power at all costs, even if that brings about hobbled, ineffective government; and the *Alliance pour la Libération du Rwanda* (ALIR)'s rhetoric on Hutu exclusion threatens to launch a war and wreck the national economy and reflects a desire to obtain political power at all costs without regard for the larger consequences of that path to power.

The goal would be to prevent any faction (regardless of its apparent minority or majority status) from pursuing policies inimicable to the interest of the entire country.

It is a fact that governments have been burying their heads in the sand, negating the existence of diversity as a weapon to monopolise all the levers of power mostly on ethnic and regional bases. However, it should be agreed that forcing a problem to the back of the mind is not solving it and Rwandans must address the diversity problem. What happened in neighbouring Burundi should serve as an example of problems arising out of "free and democratic" elections in a country where a tiny minority is over-represented in the army, the security services and the administration. As long as the minority unfairly dominates everywhere, the elected President from the overwhelming majority is

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capita income average is less than $US100. *Id.* This situation leads to competition for limited resources. Of course, demagogues find this quite convenient as an escalator to power. Demagogues have consistently mobilised masses in one ethnic group against the other through the promise of gaining land. In 1994, some Hutus massacred Tutsis in an attempt to reclaim land, and after the genocide, Tutsis claimed houses, farms, plots, and property of nearly three million Hutus expelled by the RPA. Since the Tutsis and Hutus compete for control of State and scarce resources, there exists a dangerous win/lose situation where the loser always seeks retribution. Since independence this cycle of violence has escalated to the degree that a number of Hutus accept a philosophy of genocide. In their minds, the Tutsis are still represented as 'immigrants' or 'Ethiopians' who enslaved them, took their land and killed them without justification. *Mahmood Mamdani, "When Does a Settler Become a Native", Inaugural Lecture, University of Cape Town, May, 1998.; Griggs, The Great Lakes Conflict, 1997.* The basic tenet of this philosophy is that by killing every member of every Tutsi generation, the Hutus will regain the land they lost in the sixteenth century Tutsi invasion. This is why there has been no distinction between civilians and soldiers in war and a 'strike first' policy. Tutsis engage more often in selective massacres. Perhaps this is owing to the hopelessness of eliminating about 90% of the population and the Tutsi social need for Hutus to serve them. The selectively exterminated Hutus are generally the leaders, the better educated, and the elite. The youths up to the age of 35 years are also often targeted because they are likely to be enrolled in a rebellion. We have seen that the Tutsis today occupy the urban areas, own most businesses, and dominate the government, justice system, security forces, and army. The Hutus have had few economic alternatives other than subsistence farming, labouring on plantations run by the Tutsis – just like in the pre-independence era, or fighting their way back to power. For some, this means genocide. This has been the reason alleged by Rwanda to invade the Congolese territory in order "to defend Rwanda against the génocidaires of the former army and *interahamwe* militia". Under these conditions there is little or no hope of maintaining coalition government for long. Any power sharing must be coupled with strong commitments from outside countries to help assist in both economic development and to help restore balance within civil society, government, and the armed forces. Otherwise, power-sharing arrangements present a false hope.

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likely to be assassinated, which is likely to lead to gross human rights abuses amounting to genocide.

Frequent elections with universal suffrage would prevent the sort of minority tyranny that has characterised Rwanda before independence and after the genocide and of the majority tyranny that resulted in the genocide. Strong government action to enforce civil rights and prevent discrimination would prevent the continuation of tyranny within the Rwandan society.

Yet what if a government, elected through free and fair elections, decided to act only in the particular interests of one particular group? *Publius*'s understanding of democracy would entail a government so devised as to make it extremely difficult for one faction to dominate all parts of the State. This could mean, at least, a firm separation of powers among different spheres of government. But it would also entail the creation of more than one source of legislation with independent and overlapping constituencies, as well as the sequentially staggered elections of various parts of government. This would force any punitive majority faction to prevail across so many areas and over so many elections that it would have to make coalitions, thereby broadening its view towards the common interest, if they wished to control government.

3.9.3.3.6 Defending public interests

Obviously, pursuing the *status quo* is not an option for a new Rwandan government. The conception of democracy advocated here would entail devising ways to force groups to look towards the national interest. Yet, in contrast to consociational models, it would also require the creation of a government strong enough and effective enough to do so. A new government will have to move quickly and wisely if it is to reverse reigning ethnic discrimination, bring an end to factional violence and address the widespread poverty which threatens to ruin any shared future the country might have. This emphasis on energy and dispatch would mean that the government must have a unitary executive. Yet all branches of the national government (executive, legislative and judiciary) would need to possess strong powers to address the pressing social ills. It would have to be able to stop and reverse existing patterns of ethnic discrimination in education and other areas. And it would have to be able to raise sufficient revenue to pay for some social services.

Beyond these general principles, any specific institutional arrangements have to be relevant to the Rwandan context. It is the larger understanding of democracy that underpins the American Constitution that may offer general solutions to several potential problems confronting a new Rwandan Constitution.

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Some might argue that such an understanding of democracy is inappropriate to either of the contending visions of Rwandan society. As *Compton* has recently written, if Rwanda is a deeply divided society based on ethnic cleavages, a new Constitution must provide Tutsis and other minorities with "effective representation at all levels of government" and check Hutus' attempt to impose their identity on others.[1620] However, what if the new Rwanda is a "normal, nearly homogeneous society", as the *Rassemblement pour le Retour des Réfugiés et la Démocratie au Rwanda* believes?[1621] As *Karenga* asks, in a Rwanda "deemed to be a regular society suited to a normal form of majority rule, how can the MDR accept a Constitution in which the minority parties are protected through numerous checks and balances?"[1622]

The understanding of democracy advocated in this dissertation is necessary, regardless of whether a society is "nearly homogeneous" or "deeply divided". If *Publius*'s understanding of human nature is correct, societies do not have to be fundamentally divided along ethnic lines in order to require checks on the human capacity for tyranny. On the other hand, this philosophy of democracy is appropriate in a deeply divided society like Rwanda because it would prevent any group from imposing its identity on others. But, more importantly, the policy to be adopted would have to shift away from a primarily strategic bias to a fully developed human rights priority. What is involved is not a token gesture but a genuine breaking of new ground. A settlement is not possible unless it simultaneously recognises the interests and rights of the parties involved while moving them all to a new relationship. This new relationship must create the prospect for fulfilment of the aspirations of the majority, while protecting the rights and interest of the minorities.[1623] In this regard, this philosophy of democracy does not mean the protection of Tutsis by giving them ethnically defined legal status; this would only exacerbate and perpetuate the existing divisions in society. Rather, it would offer protection through individual rights (especially the unqualified rights of political association and speech) and by offering all groups multiple points of access to government. This would facilitate the natural development of a multiplicity of interests and sects that would come to compete with and eventually damp down ethnic cleavages. Indeed, to some extent, it is the lack of

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[1620] Compton, S., 'Can Democracy Bring Peace to Rwanda?', *Rwandanet*, 29 Oct. 1999.

[1621] RDR, Plateforme Idéologique du Rassemblement pour le Retour des Réfugiés et la Démocratie au Rwanda, Paris, 23 August 1998.

[1622] Karenga, M., Hutus and Tutsis Peuvent Vivre Ensemble, Interview on Channel Africa, 10 April 1997. Author's translation.

[1623] Welch and Melzter affirm that "the basic principles derived from a human rights strategy are: (1) majority rule with constitutional protection for minorities; (2) economic justice and development for all; and (3) strategic self-reliance". *Welch, C.L and Meltzer, R.I., Human Rights and Development in Africa, New York: State University of New York Press, 1984, p. 252-3.*

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such protection that has led to authoritarian repression. The difficulty has been how to guarantee these in the face of majority tendencies to override them. That is why the ombudsman should be created with the power of, *inter alia*, arbitration in case of dispute.

3.9.3.3.7 A liberal society and equal chances in the management of resources

A new understanding of democracy would result in the balanced development of a liberal society guaranteeing equality of chances in the management of resources. As already seen, poverty and under-development are incompatible with democracy, human rights and the rule of law. In some aspects the war which devastated Rwanda in 1990 and its related massacres by the former army, the RPF and the militia can be seen as a Malthusian phenomena of adaptation of the population-resources balance in a limited geographic area. Many people lost their lives because of their properties. The appropriation of movables and real estate of the dead and refugees by dignitaries of the government and army officers can prove that phenomena.

Democratization of mechanisms of access to resources, and fighting against the monopoly by some (ethnic group, region, religion, etc.) of the mechanisms of social distribution of wealth is an essential factor to prevent that the struggle for political power (normal in every society) degenerates into bloody conflict. This suggests that, in order to assure social peace and public security, it is important to conceive and establish a political and economic system allowing rapid development of the private sector and civil society. The government should play a minor role as employer. The majority of people would live and fulfil themselves away from the government and its dependencies. Free NGOs and a strong civil society would flourish.

The result would be that the struggle for the control of the State and, thus, of economic resources, would be civilised and people will cease to resort to violence and war. In any case, legal and institutional mechanisms would be set up to avoid that cupid individuals or groups monopolise the national economy.

In the final analysis, such an understanding of democracy corresponds well with logic as well as with our experience of human nature. It may provide Rwanda with benefits such as a way to curb factional tyranny and construct a government that would advance the national interest. But most importantly, recent developments have reflected an awareness of the necessity to curb majority rule.

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Publius's philosophy of democracy offers a legitimate basis on which to locate such arguments. Significantly, it also offers a resolution to the potential tensions between majoritarianism and non-ethnicism within the Rwandan context.

Government is always conducted by elites and we only fool ourselves at our own risk by thinking that public masses can rule through these elites. The essence of popular self-government in Rwanda should be to control elites while safeguarding human dignity and freedom regardless of peoples' ethnic group or belief. That is the only kind of democracy that will get Rwanda out of the impasse.

3.9.3.3.8 The ombudsman institution

The institution of the Ombudsman was first established in Sweden in 1809 and was adopted by Denmark in 1954. However, since that time it has been adopted by many other countries such as New Zealand, Canada, Norway, Australia, Britain, Guyana, Mauritius, India, Malaysia, Ireland, Switzerland and the United States of America. The first country to adopt it in Africa was Tanzania in 1966,[1624] followed by Ghana (1969 and 1980)[1625] and Zambia in 1973.[1626] Such an institution has never been established in Great Lakes countries in general and in Rwanda in particular.

The function of the Ombudsman is to protect the individual citizen against maladministration or against administrative partiality, favouritism, or unfair and unjustified decisions that frequently arise from the business of administration. *Chomba* has described the purpose of the Ombudsman as follows:

> ... in so far as the Commission will have a duty to see that the bureaucracy does not act arbitrarily to the detriment of the citizen, it can be said to have been established for the protection of human rights. In the process of protecting such rights it will simultaneously promote the rule of law. Moreover, since in its remedy-seeking role on behalf of the common man the Commission will contribute to good government and as good government is a *sine qua non* in the advancement of democracy, by having a right to make complaints against public officials, the common man will thereby participate immediately in the system of government.[1627]

It would be very helpful if Rwanda had the Ombudsman under any appellation. Like in many different systems, it should be composed of four members: an Investigator-General (who would be the Chairman) and three persons schooled and experienced respectively in law, investigative technique,

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[1624] It was called the Permanent Commission of Inquiry. Dlamini, Human Rights in Africa, at 42.

[1625] Zimba, The Zambian bill of rights, at 220.

[1626] It was called the Commission of Investigations. See the Zambian One-Party Constitution, part IX.

[1627] Chomba, F.M., An Explanation of the Functions of the Commission of Investigations, 1974, p. 8.

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and criminology and corrections.[1628] To make the Ombudsman institution more accessible to all people even in the rural areas and small towns, there should be one representative in each 'commune' with office at the *'bureau communal'*. His mandate would be to register complaints and to present them to the Investigator-General for investigation or follow-up. This would avoid the confinement of the Ombudsman's operations to the major urban areas only and complainants who do not live in these areas would not have to travel long distances at great cost and inconvenience to present their cases to the Ombudsman.

The Investigator-General should have the qualifications of a Court of Appeal Judge and enjoy the same tenure as a Court of Appeal Judge. Him and his staff would be chosen by the parliament after each general election, to serve for the period until the next election, unless removed earlier by vote.[1629] Their salary should be fixed by Parliament.

The category of persons who may be investigated for abuse of power or office should be very wide. As is the case in Tanzania[1630] or in France[1631], it should be possible to investigate the conduct of any person in the service of the Republic of Rwanda (i.e. all departments of the central government, all local authority functions, corporate bodies established by statute and public authorities or boards) who makes decisions influenced by improper motives, who is influenced by irrelevant considerations, who causes unnecessary or unexplained delays, or who makes obviously wrong decisions. It is important that the Ombudsman be empowered to challenge any legislation that may violate human rights or to challenge any action of the President that violates human rights. The Ombudsman's role should extend to investigating torture, killing, arbitrary detention or violations of other civil and political rights. As shown, a good number of the human rights violations that have occurred in Rwanda have either been perpetrated by Presidents themselves and their close collaborators, or have been encouraged or tolerated by them.

[1628] See for example art. 90 of the Constitution of Zambia Act 1991; for the New Zealand example Weeks, M., Ombudsmen Around the World: A Comparative Chart, 1973, p. 62-63; see also Fitzharris, T.L., The Desirability of a Correctional Ombudsman, 1973, p. 48.

[1629] Gellhorn, W. , Ombudsmen and Others, 1967, p. 158.

[1630] Weeks, K.M. , Ombudsmen Around the World: A Comparative Chart, California: Institute of Governmental Studies, 1973, at 74.

[1631] The French law is even more explicit for it provides that the *'Médiateur'* can investigate complaints about *"le fonctionnement des administrations de l'Etat, des collectivités publiques territoriales, des établissements publics et de tout autre organisme investi d'une mission de service public'*. Article 1 of the *Loi No.* 73-6 of January 1973 instituting a *'Médiateur'*.

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The Ombudsman should initiate an investigation at the instance of an aggrieved individual or on his own initiative. In order to make the Ombudsman's institution accessible to the ordinary person, its procedures should be as simple and as informal as possible. Lawyers should not participate in the deliberations and the rules of evidence should be extremely liberal. Thus, ordinary people can invoke the jurisdiction of the Ombudsman at minimum expense and without being intimidated by technicalities, as is the case in proceedings before the ordinary courts.

The Rwandan courts, as a branch of public administration, should be subject to examination and criticism. Therefore, the Ombudsman should have power over them and, unlike in the American system where judges' independence is equated with their being unsupervised except by other judges;[1632] he should look at what judges have been doing. In this regard, however, the Ombudsman should not be concerned with the content of courts decisions (which, in any event, he cannot revise in any way), but only with the question of whether a judge has been acting illegally by, for example, denying justice, delaying a trial, or accepting bribes. It is the author's contention that since illegality concerns any citizen and, *a fortiori*, any office bearer, consideration of the judge's decisions should be an inescapable necessity. This assertion is supported by the Swedish example where an appellate judge was found guilty of having accepted compensation to help a lawyer prepare documents for use in litigation; the judge was not himself related to the litigation and no corruption of justice entered into the case, but the defendant was simply accused of improper behaviour in acting as a lawyer's assistant. The Supreme Court, before which his trial occurred, convicted him and imposed a heavy fine. At about the same time, three trial court judges were successfully prosecuted because they had heard and decided a forfeiture case without first giving an interested person the prescribed formal notice; the judges had thought that formalities could be waived because the interested person's legal representative was actually present in the court when the case came before the court. In this instance, by contrast with the example previously discussed, the Ombudsman was acting as a critic of judicial work rather than of a judge's personal behaviour.[1633]

[1632] Weeks, K.M., Ombudsmen Around the World, at 39; Gellhorn, W., Ombudsmen and Others, at 237.

[1633] The judges' decision on the merits of the forfeiture case, incidentally, was affirmed on appeal. Moreover, the person from whom the required notice had been withheld did not recover the property in controversy, nor were any damages awarded in the proceedings against the judges. The judges were, however, fined approximately half a month's salary. One of them used to become almost explosively red in the face when discussing the matter. He thought, moreover, that his work in the community was made more difficult for a time by reason of his having been convicted as a malefactor, though the difficulty was not long-lived because, as he said, the public had no choice in the matter. He also thought that press publicity about complaints to the Ombudsman against a judge tend to be harmful to judicial administration even after the judge has been exonerated, because the newspapers, he said, "blow up the charges out of all proportion." Despite all this, he characterised the Ombudsman as "really very pleasant fellow" and regarded his work as "highly useful". Gellhorn, Ombudsmen and Others, at 238.

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Furthermore, since, as seen in Chapter two, human rights and the rule of law apply to all without distinction, the Ombudsman should watch against abusive treatment of military personnel. He should have jurisdiction over matters directly involving relationships within the armed forces. This should include disagreements between inferior and superior ranks and his power should consist in criticising and suggesting.

As can be gathered from the discussion above, the Ombudsman can consider, not only whether a public authority has acted in a systematically obstructing or hasty manner, but also whether it has acted without due equity or humanity. In this regard the role of the Ombudsman is to be clearly distinguished from that of the *Conseil d'Etat* which is concerned with the legality of action taken by public authorities. It can rule not only that there has been use of power beyond legal authority[1634], but also abuse of power by a government department or agency.[1635] Nevertheless, the Ombudsman can go further than the *Conseil d'Etat* and can complement its role by saying that, although a public authority has not acted illegally, it has not acted fairly or with proper humanity. One example, from the French *Médiateur,* even though a very minor one, can illustrate this difference: in his Annual Report for 1973, the French *Médiateur* described a case in which a citizen complained to him that he was being required to pay charges for the supply of water for a house in which he was not living. The authority had replied that the charges must be paid because the complainant had not informed them that he had vacated the house. The complainant had no case in law, but the *Médiateur* argued that it was not reasonable to require payment of the charges since the authority did not dispute the fact that the house had been standing empty during the period in question.[1636]

The Ombudsman's wide frame of reference should appropriately be matched by power to recommend improvements in administration and legislation. In case the Ombudsman should find a complaint justified, he should not only recommend redress for the individual complainant but also suggest ways in which the administration of the service concerned should be improved. He should also propose changes in legislation where he finds that the law is working inequitably.

If, having made his recommendations following an investigation, the Ombudsman would not receive a satisfactory reply from the public authority concerned, he should, as is the case in the French system, publicise his recommendations in a special report which he should send to the Parliament.

[1634] This is the *'excès de pouvoir'* in the *Loi* of 23 February 1963, as modified, instituting the *d'Etat.*

[1635] This is the *'détournement de pouvoir'* in Rwandan law.

[1636] See Stacey, F. , Ombudsmen Compared, 1978, p. 97, citing the *Rapport Annuel du Médiateur, Paris, 1973.*

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He should also have another sanction if the authority concerned is not willing to act on his recommendations. He should invoke a disciplinary procedure against the official concerned or take judicial action against him.[1637]

In any case greater publicity should be secured for the office of the Ombudsman through a systematic campaign. This campaign should be conducted under four principal forms. First, the Ombudsman should establish and maintain links with the national and regional press and with radio and television. He should take part in several radio and television programmes in order to get his office known as widely as possible. Second, he should make a series of visits to different regional centres where he could meet prefects, burgomasters, parliamentarians, chairpersons of chambers of commerce, industry and agriculture, bodies concerned with regional development, representatives of trade unions and voluntary associations, students and the press. Considering the smallness of the Rwandan territory and the facilities to reach every corner of the country, it is certain that almost every citizen would be reached and the Ombudsman should be concerned in all these meetings to give information about the scope and working of his office, and to acquire information about the impact he would or would not be making in different sectors. Third, he should commission opinion polls to try to find out how widely known he is and how he could best increase public knowledge of his work. Fourth, his office should produce annual reports that should be given wide circulation. The combination of these four forms would reduce the possible gap between the public perception of the Ombudsman and the potentialities of his office.[1638]

It follows from the above discussion that the Ombudsman would play a useful role in alleviating the suffering of a number of individuals. The author, however, submits that the Ombudsman cannot be a viable alternative to the bill of rights in view of the various problems discussed above.

3.9.3.3.9 Directive principles of State policy

Directive Principles of State Policy are found in a number of constitutions of some countries like India and Nigeria. Directive Principles stipulate certain economic and social goals to be pursued by the State, and impose certain obligations on the State to take positive action in certain directions in order to promote the welfare of the people and achieve economic democracy.

[1637] Articles 9, 10, and 14 of the 1973 French Act.

[1638] Stacey, Ombudsmen Compared, at 101-102.

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The incorporation of Directive Principles in the Constitution arises from a recognition that the duties of a modern State are no longer confined to the maintenance of law and order, but extend to the promotion of prosperity and wellbeing of its people. Directive Principles do not only have an educative value but they also serve as a restraint on the government which, in exercising its power, has to take them into account. Failure to abide by the Directive Principles may cost the government the next elections.[1639]

Directive Principles are non-justiciable because, while the judicially-enforceable bill of rights imposes negative obligations on the State, i.e., what it should not do, the directive principles of State policy impose positive obligations on the State, i.e., what it should do, and for such type of actions, the State faces all kinds of practical constraints, the most critical of which is the issue of resource mobilisation.

The Indian Example: In the Indian Constitution the principles have been drafted in flexible and general language, thereby leaving enough scope for the government to from time to time frame its policies in accordance with its own thinking and prevailing circumstances to achieve the results and ideals stipulated in the Directive Principles.[1640] Although the principles do not designate any particular form of economic or social order, they lay down the goals which the society has set for itself. In enacting the Directive Principles the framers of the Indian Constitution sought to give some guidance to the future legislature and the executive *vis-à-vis* the manner in which they should exercise their power.[1641]

The Directive Principles in the Indian Constitution, unlike the bill of rights, do not create justiciable rights in favour of individuals and, therefore, cannot be enforced by the courts. Since the principles

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[1639] Jain, Indian Constitutional Law, Bombay, 1962, p. 669.

[1640] These principles are contained in Art. 38-51 of the Indian Constitution (1949). Art. 38 directs the State "to strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life". Under Art. 39 the State is required, in particular, to direct its policy towards securing (a) that all citizens irrespective of sex, equally have the right to an adequate means of livelihood; (b) that the ownership and control of the material resources of the community are so distributed as best to serve the common good; (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment; (d) that there is equal pay for equal work for both men and women; (e) that the health and strength of workers, men and women, and children of tender age are not abused and that citizens are not forced by economic necessity to enter vocations unsuited to their age or strength; (f) that childhood and youth are protected against exploitation and against moral and material abandonment. Other principles require the State: to make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, etc. (Art. 41); to endeavour to provide free and compulsory education for all children until the age of 14 (Art. 45); to raise the level of nutrition and the standard of living of its people and to improve public health (Art. 47); and to take steps to separate the judiciary from the executive in the public services of the State (Art. 50), etc.

[1641] Id., at 669 & 670. The Directive Principles are modelled on those of the Irish Constitution (Id., at 3).

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are merely directory in scope and operation the legislature may enact legislation that is inconsistent with them.[1642] Moreover, a directive principle cannot override a fundamental right and the latter takes precedence in the event of a conflict between them.[1643]

Although the principles are not justiciable they have nonetheless served as an aid to the interpretation of the bill of rights. As *Jain* notes,

> Without making the Directive Principles justiciable, courts do not seek to implement the values contained in these principles to the extent possible. Accordingly, the Directive Principles have been regarded as a ready and dependable index of what a public purpose is intended to be. Though the term public purpose is not synonymous with the Directive Principles, yet where the purpose of any restriction is identical with any of these principles, the court considers the law containing such restrictions as having been passed for a public purpose... The Directive Principles are also regarded as relevant for considering what are reasonable restrictions under Art 19. A restriction, which promotes any of the objectives of the Directive Principles, may be regarded by the courts as reasonable.[1644]

It would be helpful if Rwanda incorporated Directive Principles along the Indian model in her Constitution. Apart from guiding the government in its formulation of economic and social policy, they would be invaluable as regards interpretation of the bill of rights. As Chapter two has shown, most of the fundamental rights and freedoms are subject to numerous restrictions, many of which involve the protection of public interest. To ascertain what constitutes public interest, for example, the courts could refer to the Directive Principles for guidance.

Moreover, the incorporation of Directive Principles in the Rwandan Constitution would be a good way of incorporating the economic, social and cultural rights enshrined in the United Nations Covenant on Economic, Social and Cultural Rights of 1966, which Rwanda acceded to on February 12, 1975.[1645]

[1642] *Deep Chand v U.P*, AIR 1959 sc 648, 664.

[1643] *Madras v Champakam Dorairajan*, AIR 1951 SC 226, 228. In this case the Supreme Court of India held that the fundamental rights would be reduced to "a mere rope of sand" if they were to be overridden by the Directive Principles and that Legislation made to implement Directive Principles should not take away or abridge the fundamental rights. According to the court the Directive Principles have to conform, and run as subsidiary, to the fundamental rights. However, the Indian Supreme Court *In re Kerala Education Bill*, AIR 1958 SC 956, stated that in determining the scope and ambit of fundamental rights invoked by a litigant the court may not entirely ignore the Directive Principles but should adopt the principle of harmonious construction and should endeavour to give effect to both as much as possible.

[1644] Jain, Indian Constitutional Law, at. 671. He cites *Bihar v Kameshwar*, AIR 1952 SC 252; *Suryapal Singh v U.P*, AIR 1951 All. 671, 684; and *Buddhu v Municipal Board*, AIR 1952 All. 753, in support. Art. 19 guarantees to every citizen the right to move freely throughout India, and to reside and settle in any part of India. But the State may impose reasonable restrictions on these rights by law in the interests of the general public or for the protection of the interests of any Scheduled Tribe (Art. 19(5)).

[1645] J.O., 1975, p. 230; Human Rights Law Journal, vol. 19, No. 2-4.

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This is because many of the Directive Principles of State Policy in the Indian Constitution are similar to the rights in the aforementioned United Nations Covenant.

As can be gathered from the discussion above, the Directive Principles of State Policy, being non-justiciable, cannot be a viable or effective alternative to the bill of rights. Taken by themselves they are incapable of protecting human rights, as they depend for their implementation on the ultimate sanction of public opinion as expressed at the polls.

For this reason it is submitted here that, as in India, the Directive Principles should complement, rather than replace the bill of rights which, despite its many weaknesses, limits government power towards the individual. By directing the government to strive to promote economic development, and to eliminate poverty, illiteracy, disease and ethnic rivalries, the Directive Principles would contribute to the promotion and enforcement of human rights. It is these factors, among others, as seen in Chapter two, which have had such an adverse impact on the protection of human rights in Rwanda.

3.9.4 Impact of the African Charter on Human and Peoples' Rights

The question for consideration here is: to what extent can the African Charter on Human and Peoples' Rights (also known as the Banjul Charter), of which Rwanda is a party, be used to challenge human rights violations in States that have ratified it?

The African Charter has been hailed as a unique and amazing instrument among the systems of human rights protection. Unlike the European and American Conventions which provide only for the protection of the first generation rights, the African charter guarantees the protection of all the three generations of rights. Apart from the civil and political rights otherwise known as the first generation rights, the charter also guarantees the protection of economic, social and cultural rights, specifically the right to work, health and education, which are generally known as the second-generation rights. As regards enforcement, however, the African Charter is hopeless. The basic obligation of the State parties to the Charter is spelled out in Article 1. It provides that they "shall recognise the rights, duties and freedoms enshrined in this Charter and shall undertake to adopt legislative or other measures to give effect to them". This obligation is complemented by Article 62, which requires State parties to report biennially "on the legislative or other measures" they have "adopted to give effect to the rights the Charter guarantees". In practice, there has been no concrete action to make the process work[1646], while the European Convention on Human Rights was supplemented by the European

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[1646] Although the African Commission on Human and Peoples' Rights (*see infra*) sometimes reviews reports from States,

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Social Charter[1647] and its Additional Protocol, which protect fundamental social and economic rights.[1648]

In addition, the African Charter has provided guarantees regarding collective rights, as well. These are group rights communities may claim against communities, States, the international community, etc.[1649] They include freedom from foreign domination, the right to development, the right to international peace and security, the right to a generally satisfactory environment, etc. In international law, these rights are known as the third generation rights. In the context of these provisions, articles 2 to 14 of the Charter protects civil and political rights while Articles 15 to 17 guarantees education, work and health. Article 18 guarantees protection to the family in Africa as the custodian of morals and traditional values. Collective rights are guaranteed in Articles 19 to 24. Significantly, the Charter also enjoins the individual with duties such as the duties towards the family and the State: duty to respect others; duty to accord respect and dignity to all without discrimination; duty to respect the family and ensure its development, etc.

The civil and political rights which are guaranteed in Articles 2 to 14 and which should be protected by State parties to the Charter are the same as those that usually attract protection under other human rights instruments. These include the right to be different, i.e. to speak a language different from others, to be of a different colour, to be of a different sex, religion, ethnic group, etc; the right to equality before the law; the right to life and the integrity of the person; freedom from slavery, inhuman cruel or degrading punishment and treatment; the right to the security of the person; freedom of conscience; the right to receive information and to express and disseminate information; the right to association and the right to freedom of assembly; the right to freedom of movement and

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the process is apparently not working well as yet (*see "African Commission on Human and Peoples's Rights"* 47 I.C.J. Rev.. 51, 53 (1991) mostly since its main function is to "give its views or make recommendation to governments" (*Art. 45 (1) (a).*

1647 The European Social Charter is a treaty signed in Turin in 1961, which protects fundamental social and economic rights. It guarantees these rights to the citizens of its contracting parties. During the 2nd Council of Europe summit (Strasbourg, 10-11 October 1997), the heads of State and government of the member states made the commitment to "promote social standards as embodied in the Social Charter and in other Council of Europe instruments" and called for "the widest possible adherence to these instruments". *For details, see Council of Europe, The Council of Europe's Social Charter, Strasbourg, December 1997.*

1648 The Charter and its Additional Protocol of 1988 guarantee a series of rights pertaining to the conditions of employment and social cohesion. *Council of Europe, The Council of Europe's Social Charter, Strasbourg, December 1997.*

1649 For a comprehensive account of the development of a system of human rights protection in Africa, see Mbaye, M. and Ndiaye, B., The Organisation of African Unity (OAU), *in International Dimensions of Human Rights*, Vasak, K. and Alston, P., (eds) 1982.

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residence; the right not to be deported in a mass expulsion and the right of an individual to participate freely in the government of his country.

These guarantees bind all members of the Organisation of African Unity and are to be implemented from the date of effect of the African Charter on 21 October 1986. According to Article 1 of the Charter, membership is open to all members of the OAU. This means that a member State of the OAU is obliged to respect the Charter stipulations whereas, in contrast, membership to the European Convention is dependent upon the country's commitment to democracy. The weakness of this clause is that even undemocratic States that disrespect human rights are assured of membership of the Charter, merely on account of their membership of the OAU. Admission to the OAU is not based on the countries' respect for human rights or its democratic composition. As a result, countries that have some of the most disastrous human rights records enjoy membership of the Charter on human and peoples' rights.

Moreover, the Banjul Charter is significant because it marks a departure from previous OAU practice, which had stressed the principle of non-interference in the internal affairs of member States as enshrined in Article 3 of the OAU Charter. Prior to the creation of the Banjul Charter "that principle had been used to prevent the OAU from dealing with situations within member States which threatened or actually involved grave violations of human rights".[1650] For example, the OAU did not condemn the massive violations of human rights (which included the torture and execution of people perceived to be a threat to the government) perpetrated by such infamous African dictators as *Idi Amin* in Uganda, *Macias Nguema* in Equatorial Guinea, *Bokassa* of the Central African Republic, *Hastings Banda* of Malawi, *Mobutu Sese Seko* of Zaïre. Moreover, it has never questioned the self-proclaimed RPF government and mass execution and abduction of Hutu inside Rwanda, in refugee camps and elsewhere in Africa.

The Charter indicates that African leaders for the first time have acknowledged that human rights violations are a matter of concern for the international community.[1651]

The Charter requires State parties to recognise the rights, duties and freedoms enshrined in part 1 (Chapters 1 and 2), and to undertake to adopt legislation or other measures to give effect to them.[1652]

[1650] Hansungule, M., Regional Human Rights Law, lecture, University of Zambia, 1995.

[1651] African Charter on Human and Peoples' Rights, preamble.

[1652] Id., art. 1.

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However, it is unlikely that the Charter will have a great impact on the protection of human rights in Africa for a number of reasons.

First, many of the provisions of the Charter contain "clawback" clauses, which offer even less protection than derogation clauses contained in other covenants and conventions. Derogation clauses restrict a State's conduct by limiting the circumstances in which derogation may be permitted. The European Convention for the Protection of Human Rights and Fundamental Freedoms, for example, permits derogation only "in time of war and other public emergency threatening the life of the nation." Moreover, derogation clauses limit a State's conduct by defining rights that are non-derogable and must be observed, even when derogation is permissible. Therefore, the effect of derogation clauses is to carefully define the limits of State behaviour toward its nationals during times of national emergency, when individual rights are most vulnerable.[1653] Clawback clauses, unlike derogation clauses that allow the suspension of previously granted rights, restrict rights *ab initio*.[1654] Consequently they are often less precise than derogation clauses because the restrictions they allow are almost totally discretionary. Under the African Charter the rights granted may be limited by domestic law or the existence of a national emergency. It is apparent that by virtue of these very ambiguous and limitlessly broad standards, clawback clauses do not provide the external control over State behaviour that derogation clauses provide.[1655] This is exemplified by Article 6 of the Charter which provides that,

> except for reasons and conditions previously laid down by law, every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom.

Unfortunately, the Charter does not define these reasons and conditions. In this regard, it is actually not in any way different from the Rwandan Constitution, especially in Articles 12 and 13 which provide respectively for the liberty and security of the person "*sauf dans les cas prévus par la loi*".[1656] Thus, the State may conceivably violate its citizens' right to liberty and not be in violation of the Charter, provided that it does it under the colours of the law. In contrast other regional human rights conventions specify the minimum conditions that must be met by the State before it can deprive an individual of his liberty. For example, although the first three clauses of Art. 7 of the American Convention on Human Rights closely parallel Article 6 of the African Charter, the Article goes further

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[1653] Hansungule, Regional Human Rights Law, at 33.

[1654] Ibid.

[1655] For a detailed discussion of this subject, See Guittlemen, R., The Banjul Charter on Human and Peoples Rights: A legal analysis in human rights and development, 1284, p. 157-159.

[1656] Codes et Lois du Rwanda, Vol. I, at 24.

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by stipulating the following additional procedural safeguards for a detained person: that he be informed of the reasons for his detention and promptly be notified of the charge or charges against him; and that he be brought promptly before a judge and be tried within a reasonable time or be released. Moreover, a detained person is entitled to have recourse to a competent court, in order that the court may promptly decide on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful.

Article 5 of the European Convention provides that no individual shall be deprived of his liberty, except in certain specified situations. It also provides the same procedural safeguards as those contained in Article 7 of the American Convention. In addition, it grants anyone who has been deprived of his liberty in violation of the article an enforceable right to compensation.

Thus, it is apparent that by providing comprehensive procedural safeguards *vis-à-vis* the right to liberty, both the American and European Conventions aim at imposing external restraints upon governmental behaviour. These restraints not only ensure that a country's laws conform to the minimum standards stipulated by the convention but also ensure that governmental activity, if it violates both national law and the convention, is reviewed in a forum more sympathetic to the victim than the courts of the breaching State party.

In light of these safeguards it is needless to say that the African Charter is miserably inadequate with regard to the right to liberty. Since that right is subject to national law, the Charter cannot supply even a scintilla of external restraint upon a government's power to enact laws contrary to the spirit of the rights granted.

Undoubtedly, the fact that the guarantees contained in the African Charter are subject to clawback clauses means that the enjoyment of the rights and freedoms guaranteed in the Charter is dependent on the ordinary enactment in domestic systems of member States which do not always assure these rights. For example, freedom of association in Article 10 of the African Charter requires that the individual, when enjoying his right to associate or assemble abides by the law, which, in Rwandan context means the right conferred in Articles 19 and 20 of the Constitution on freedom of association and assembly, which is itself subject to a clawback clause involving various exceptions. Two of those exceptions include the requirement to obtain a permit under the *Loi No. 33/91*[1657] before people may assemble for a public meeting. Similarly, the right to association has been made subject to the administrative powers of government bureaucrats to register the association, a

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[1657] J.O., 1991, p. 1132.

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statutory requirement under articles 2 and 3 of the *Edit sur les associations sans but lucratif* (1962). Both the *Loi No. 33/91* and the *Edit* are restrictive of the rights to associate and assemble. This pre-empts the guarantees that may have been provided for in the Constitution or Charter.

The issue of the nation and nationalities in Africa has been manipulated in the context of multiparty politics, so that in many countries, the democratization process has reinforced the concepts of ethnic conflict in Africa. *Shivji*, in his critique of the African Charter, noted that, "taking into account the notorious authoritarian practices of African states, it is clear that what is demanded of the African people in the catalogue of duties is absolute allegiance to the existing State and the family – both of which represent, politically and historically, retrogression. This retrogression is most evident in the absence of the rights of African workers to organize independently of the State and State-supported trade union centers".[1658]

The right to organize, or the freedom of association, is one of the most important contentions of international human rights statutes. Even in the Western industrialized countries, the right of workers to organize continues to be the site of the most intense social struggles. It was the struggles of the workers in the Western industrialized countries which cemented the principal rights of trade unions, which were incorporated in the International Labour Organization (ILO) Convention on the Freedom of Association and the Right to Organize.

Such rights, which were promulgated with respect to trade unions, were articulated in 1948 when most of Africa was under colonial rule. Colonialism did not support the right of African workers and peasants to organize. One of the primary impetuses behind the independence struggle in Africa was the democratic right of African workers to organize in trade unions to demand better working conditions, but we have seen that trade unions were hindered by the State in Rwanda.

Thirty years after independence, the standards of the ILO with respect to the rights of trade unions, are hardly met in Africa. Even in the countries that reinforce multiparty democracy, the rights of workers are daily being eroded by structural adjustment programmes. Up to the present, one of the basic rights which are demanded by African workers is the freedom to form and join trade unions. The African Charter does not provide for this right. In essence, when arguing for individual rights, the African charter is so weak that it does not solve the question of collective rights for workers in Rwanda.

[1658] Sviji, I., The Concept of Human Rights in Africa, (Dakar: CODESRIA Books, 1989), p. 80.

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With reference to the silence in Africa with respect to the ILO conventions for workers' rights, there is an even greater silence on the provisions of the ILO conventions and recommendations concerning women workers. These conventions include the right to paid work; equal training and career opportunities; equal pay; equal treatment; the right to share work and family responsibilities; the right to maternity protection; and minimum wages.[1659] One of the greatest abuses experienced by women is sexual harassment.[1660] In some African languages, there is a code for coercing working women to provide sexual favors for employers. In Rwanda, before the genocide, some employers, public and private, had established what was commonly known as the "interview". This had nothing to do with the usual interview, but was a stratagem to get the lady job-applicant to a secret place, or in some cases, to the office after hours in order to have sex with her as a sine qua non to get the job.[1661] Since the genocide, women, especially Hutus, are requested by some employers "to give the *'intsinzi'*.[1662] These women without clear protection in the domestic legal system, as is the case for other minorities, are hopeless before the African Charter.

Second, some rights guaranteed by the international bill of human rights and the American and European Conventions are not mentioned in the African Charter. Among the rights not guaranteed by the African Charter are the right to privacy, the right to a nationality, the right to vote in periodic and genuine elections, the right to form and join trade unions, the right to equal protection for all children whether born in or out of wedlock, the right to marry with the full and free consent of the intending spouses and the freedom to change one's religion. In connection with these two latter rights, that is the right to marry with the free consent of the intending spouses and the freedom to change one's religion, it is interesting to underline that Egypt, one of the four then independent African States, voted in favour of the universal declaration of human rights but stipulated two reservations concerning those rights in 1948. And again, in 1984, it ratified the African Charter with almost the same kind of reservations.[1663] However, Rwanda made no reservation.

Furthermore, unlike the American and European Conventions, the African Charter does not contain a provision on capital punishment and does not provide for the right of a national not to be expelled, or

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[1659] International Labor Organization, ABC of Women Workers' Rights, A Practical Guide (Geneva: International Labor Office, 1993).

[1660] Taylor, J., and Stewart, S., Sexual and Domestic Violence: Help, Recovery and Action in Zimbabwe (Harare: Women in Law in Southern Africa, 1991).

[1661] Interview with two women, 10 February 1998.

[1662] Id.

[1663] Ouguergouz, F., La Charte Africaine des droits de l'homme et des peuples - Historique, portée juridique et contribution à la protection des droits de l'homme en Afrique, Geneva: U.U.H.E.I., 1991, P. 311.

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the prohibition of forced labour.

Third, the Charter lacks effective enforcement machinery, as it does not provide for the establishment of a Human Rights court. In contrast, a Human Rights court is created, both under the American Convention and the European Convention. Article 45 of the African Charter establishes an eleven-member African Commission on Human and Peoples' Rights whose functions are:

> (1) To promote Human and Peoples' Rights and in particular: (a) to collect documents, undertake studies and researches on African problems in the field of human and peoples' rights, organise seminars, symposia and conferences, disseminate information, encourage national and local institutions concerned with human and peoples' rights, and should the case arise, give its views or make recommendations to Governments; (b) to formulate and lay down, principles and rules aimed at solving legal problems relating to human and peoples' rights and fundamental freedoms upon which African governments may base their legislation; (c) co-operate with other African and other international institutions concerned with the promotion and protection of human and peoples' rights; (2) Ensure the protection of human and peoples' rights under conditions laid down by the present Charter; (3) Interpret all the provisions of the present Charter at the request of a State party, an institution of the OAU, or an African organisation recognised by the OAU; and (4) Perform any other tasks which may be entrusted to it by the Assembly of Heads of State and Government.

A State party to the Charter that has good reasons to believe that another State party has violated the provisions of the Charter may, by written communication, bring that matter before that State or before the Commission. In either case, the communication must be addressed to the OAU Secretary-General, the Chairman of the Commission, and the accused State. The accused State is given 3 months to respond to the enquiring State. If the parties fail to resolve the matter amicably, either party may submit the matter to the commission and notify the other State of such action. The commission will only deal with the matter after satisfying itself that all local remedies have been exhausted.

Under Article 46 communications made by individuals or non-governmental organisations may be considered by the commission provided that a simple majority of its members so decide and the communications conform to certain criteria. However, such private communications can only be considered if, after deliberation, the commission concludes that the communications pertain "to special cases which reveal the existence of a series of serious or massive violations of human and peoples' rights". In such cases the Commission cannot independently investigate them unless it first secures a specific mandate from the Assembly of Heads of State and Government. This strongly

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suggests that the commission merely functions as a sub-committee of the Assembly with no independent authority of its own.[1664]

The impotence of the Commission is further underscored by provisions regarding the results of its investigations. Once the Commission has investigated a State-communicated matter and determined that an amicable solution is impossible, it sends a report to the Assembly of Heads of State and Government, stating the facts, and its findings. It may also make such recommendations as it deems useful. The Commission cannot make its recommendations public without the prior approval of the Assembly. Neither can it publish its report (regardless of the source of the communication) without prior authorisation from the Assembly.

It is apparent that the effectiveness of the Commission is undermined by the provisions that shroud its work in secrecy. Publicity is indispensable for exposing and checking human rights abuses. *Scoble* observes that,

> ... the persistence of official secrecy - the refusal of intergovernmental human rights agencies to publicise the fact that they have taken official cognisance of well-documented violations - is one of the governmental face-saving procedures that most human rights NGOs have sought to banish, on the grounds that secrecy encourages the violators, delaying the ending of violations or even more substantial internal political change. Furthermore, the potential impact of NGOs has been described as "the mobilisation of shame", and this cannot be accomplished without the widest publicity on violations and violators alike.[1665]

The heavy reliance on States to initiate complaints of human rights violations, and on the Assembly of Heads of State and Government to take remedial action is a fatal flaw of the African Charter. This is because African leaders have not in the past been enthusiastic about protecting human rights as most of them have violated the rights of their citizens at will. In fact, some of the worst human rights violators such as *Amin* and *Mengistu Haile Mariam* were elected chairmen of the OAU, a post that has also been held by many military dictators.[1666] The sad history of African leaders failing to criticise egregious human rights violations and honouring gross abusers of human rights does suggest that the commitment to human rights by African governments is, at best, minimal. Besides, governments everywhere are often reluctant to criticise the human rights records of other governments for fear

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[1664] Id., at 39.

[1665] Scoble, H.M., Human Rights Non-Governmental Organisations in Black Africa: Their problems and prospects in the wake of the Banjul Charter *in Human Rights and Development in Africa, p. 196-7.*

[1666] Ouguergouz, La Charte Africaine des droits de l'homme et des peuples, at 317.

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that they themselves will be criticised.[1667] Thus, it is highly likely that few, if any, complaints will be communicated to, and investigated by the African Commission.

Another major flaw in the enforcement mechanism of the African Charter is that no sanctions are laid down for States that violate the rights of their citizens. This, coupled with the fact that the proceedings, report and recommendations of the African Commission remain confidential at the discretion of the Assembly of Heads of State and Government, will probably result in sanctions not being applied against the rogue State.

As far as the organisation of the Commission is concerned, it is important to point out that the Commission is still not yet really operational insofar as it lacks an efficient secretariat to back its different activities. As a matter of fact, the secretariat is dramatically understaffed, the total staff numbers only 9 persons: a bilingual secretary, a filing clerk, a receptionist, two drivers, one photocopier and the secretary of the Commission itself who is the only lawyer but who is dealing mainly with organisational issues. There is still no permanent legal officer who can assist the Secretary with the fulfilment of his legal tasks. There also is no information officer who can publicise the work of the Commission.[1668] In comparison, the European Commission has a staff of around fifty lawyers.[1669]

Moreover, the credibility of the Commission is at stake. "Some of the commissioners are holding governmental positions" which might affect their impartiality. In fact, some members of the Commission are sitting in the high court of their respective countries and others were or still are Attorney Generals or Ambassadors. The previous Commissioner from the Congo simultaneously held the position of Minister of the Interior of his country.[1670] One could imagine what the position of such commissioners would be if they had to decide on a case in which they had previously been

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[1667] Ibid.

[1668] Ibid.

[1669] "The total established staff of the secretariat at the end of 1995 comprised 49 lawyers, 35 administrative or secretarial assistants and 4 translators, i.e. a total, excluding the Judges [*sic*] of 88, to which must be added a further 24 temporary staff. All the senior staff, including the Secretary and Deputy Secretary, are lawyers. These include 5 Deputies to the Secretary (to be distinguished from the Deputy Secretary himself) who are respectively Secretary to the First and Second Chambers or in charge of case programming or of personnel/budget, or advisor on case law and external relations. Others are in charge of publications and of research. The remaining 40 lawyers are spread over 11 Applications Units and are responsible for examining complaints and supporting the work of the Commission Committees, Chambers and Plenary at the admissibility stage of the proceedings. As the vast majority of petitions fail to pass the admissibility test, this is the stage at which the bulk of the Commission's work takes place", Neville March Hunnings, *The European Courts*, London, Catermill Publishing, 1966, p. 264-265.

[1670] Ouguergouz, La Charte Africaine des droits de l'homme et des peuples, at 342.

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directly involved. Indeed, the African Charter did not prevent such a situation and lacks a provision on incompatibility of positions.

In order to reinforce the African machinery of human rights protection, there is need for an operational human rights commission and an efficacious human rights court. As far as the opportuneness of such a court is concerned, the O.A.U. Assembly of Heads of State and Government adopted resolution AHG/Res. 230 (XXX) by which it requested the Secretary-General of the O.A.U. "to convene a Government experts' meeting to ponder, in conjunction with the African Commission and to consider in particular the establishment of an African Court on Human and Peoples' Rights" in June 1994.[1671] Consequently, a couple of Government experts' meetings were convened. Finally, on June 1998, in Ouagadougou (Burkina Faso), the OAU Assembly adopted a "Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights". This protocol, however, is not in force yet; it shall come into force thirty days after fifteen States have ratified it or acceded thereto.[1672] But the main problem with the creation of an African court on human and peoples' rights is the question of funding. The O.A.U. is facing a serious financial crisis and the author fears that, if it is established, the African court will not have the material means to fulfil its mission.

With regard to the creation of an African court, the author would suggest amending the constitutive Charter of the O.A.U. This is feasible, provided that the principle of respect, promotion and protection of human rights becomes one of the basic principles of the organisation. Thus, any State which would persistently violate human rights should be deprived of its rights as State member of the Organisation, in addition to other political and economic sanctions to be determined in the Charter. Whereas the Council of Europe is based on the principles of pluralistic democracy, rule of law and respect for human rights, the 1963 O.A.U. Charter emphasises the principles of the State's sovereignty and non-intervention.

In light of some of the flaws discussed above, the author's considered view is that the African Charter is unlikely to have a significant impact on the protection of human rights in Africa, and in Rwanda, in particular.

[1671] Two government legal experts' meetings took place respectively in Cape Town (September 1995) and Nouakchott (April 1997). A third Government legal experts' meeting, enlarged to include diplomats, took place in Addis Ababa from 8 to 11 December 1997; this third meeting received a mandate from the 66th Ordinary Session of the O.A.U. Council of Ministers to finalise the draft and to submit it for adoption to the Ministers of Justice. The Assembly of Ministers of Justice approved the draft on 12 December 1997 in Addis Ababa and recommended its adoption by the O.A.U. Council of Ministers and the O.A.U. Assembly of Heads of State and Government.

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3.9.5 Improving the existing machinery

3.9.5.1 Re-drafting of the bill of rights

It has been suggested by some [1673] that African countries should abandon Bills of Rights because they do not work and they merely generate unnecessary conflict between the political branches of government and the judiciary. According to *Zimba*, alternative ways such as the institution of the ombudsman, which does not involve confrontation between the judiciary and the other organs of the government, should be adopted.[1674] *Jain* suggests that Directive Principles of State Policy are better and more effective methods of protecting human rights than a bill of rights.[1675] As seen, these methods have some useful elements. But they suffer from major defects and cannot by themselves effectively protect human rights. They can rather play a useful role in supplementing the bill of rights.

A bill of rights is of critical importance in a country like Rwanda which is ethnically polarised, has a strong presidential form of government, and lacks a democratic tradition and commitment to the protection of human rights. The history of the world has shown that a government that possesses enormous power which is not subject to review by the courts is more likely to violate individual rights than one whose powers are limited by, *inter alia*, a bill of rights.[1676] It is naive to expect that the government will, in the absence of a justiciable bill of rights, voluntarily protect human rights.

[1672] Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights, art. 39.

[1673] Zimba, for example, has written that "in the context of the African situation protection of human rights through their entrenchment in the Constitution and making the courts agents for their actual enforcement cannot work, or at least it has not proved to be an effective means of their protection, given the operative factors prevailing in Africa ... . Indeed this may prove to be the surest way of destroying them completely. Some other ways must therefore be recommended. The best approach to the problem would be to look for a system of protection which would not, in its practical operation, manifest itself in the form of a challenge to the authority of the government in its exercise of the legislative and executive powers. Protection through constitutional guarantee of a bill of rights offends against this requirement since when the procedure under it is invoked, it invariably needs an individual ... to challenge the wisdom of a government policy or the validity of a certain law or laws passed by the government. What is even worse is the fact that the institution vested with the power to review government acts is itself not part of the legislative or executive machinery - i.e. the courts which the Constitution purports to remove from the political arena ... On the contrary, a viable system for the protection of human rights in Africa must not present itself as controlling or checking the activities of the government, and of being apart from the political process as such. Such a system must recognise the unhappy practice of non-reviewability of State actions, at least to the extent of not invalidating them at the instance of their repugnancy with some superior law; further, such a scheme of protection must also be part of the political process and must enjoy the support of the 'party and its government". *Zimba*, The Zambian bill of rights: Historical and Comparative Study of Human Rights in Commonwealth Africa, 1984, *at 214-229.*

[1674] Ibid.

[1675] Jain, Indian Constitutional Law, at 474-475.

[1676] One important exception is England, which does not have a written Constitution and a bill of rights. Parliament is sovereign, that is, it can pass any law even though it abridges, modifies or abolishes any fundamental right or freedom. However, the executive cannot interfere with the rights and freedoms of the individual without the sanction of law. Therefore, the protection of individual rights does not rest on constitutional guarantees but on public opinion, good sense

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It is inevitable that, in many situations, the operations of political branches of the government will come into conflict with individual rights. Such a conflict can only be resolved fairly by an independent, impartial body, i.e., the judiciary. Moreover, in the absence of a bill of rights there is always a danger that the majority in the legislature may enact legislation that may be oppressive to individuals or minority groups. Justice *Jackson* explained the purpose of a bill of rights in the United States as follows:

> The very purpose of a bill of rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.[1677]

What can be done since the bill of rights in its present form has failed to protect human rights in Rwanda?

The discussion of the bill of rights in Chapter two revealed that almost all the rights guaranteed by the one-party Constitution contained clawback clauses that have been so numerous and broad as to render the protected rights meaningless. As indicated elsewhere, that bill of rights has been reproduced almost verbatim, both in form and content, in the 1991 Constitution. It is suggested that the bill of rights should be drafted in such a way as to remove most of the clawback and derogation clauses, and to vest the power to decide on how far the legislature can interfere with the guaranteed rights in the courts. The Canadian Charter of Rights and Freedoms would be a good model for a new Rwandan bill of rights. Most of the rights and freedoms enshrined in the Canadian Charter, like the United States bill of rights, are stated broadly, without qualifications. For example, Article 2 provides that,

> Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.

Regarding permissible derogations, Article 1 provides that,

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of the people, strong common law traditions favouring individual liberty and the parliamentary form of government. The reason why human rights thrive in England is that the country is a small and homogenous nation, having deep-rooted democratic traditions. These conditions, however, do not exist in African countries which are composed of people of diverse ethnic, racial and religious groups, having no deep-rooted traditions of individual liberty and democracy. As Bowie notes, "The unique English situation is not simply exportable, and other nations have generally felt that their governments need the constant reminder which a bill of rights provides, while their people need the reassurance which it can supply." Bowie, Studies in Federalism, 601. See also Wase and Bradley, Constitutional Law, 591.

[1677] In *West Virginia State Board of Education v Barnette*, 319 US 624.

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> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This provision imposes on the State the burden of proving that the limits placed on the exercise or enjoyment of a particular right or freedom are reasonably justifiable in a free and democratic society. Thus, an aggrieved person need only show that his rights or freedoms have been violated under a particular law. This makes it much easier for an individual to bring a human rights suit against the government than is the case under the Rwandan Constitution.[1678]

One of the merits of the Canadian Charter is that by protecting the rights and freedoms in broad terms (in most cases without qualifying them) it allows courts ample latitude to enforce them. Another significant aspect of the Charter is that it declares that the guarantee of "certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.[1679] Such a provision is not contained in the Rwandan bill of rights and, although Rwanda is party to most of the international human rights instruments of general application its legislation is silent on whether these instruments are self-executing, and jurisprudence and diplomatic practice are non-existent.[1680] This would result in the violation of the international bill of human rights by the Rwandan judge or other competent organ confronted with a problem involving a provision of international law. The Constitution should therefore, expressly make provision for the application of all international human rights instruments to which Rwanda is, or shall be, a party by ratification or accession.[1681]

[1678] See for e.g. *M.P v Kalinda*, RPA 231/CYA, 1987 (unreported).

[1679] Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Part I, Art. 26.

[1680] The notion of dualism or monism is still obscure in Rwandan law unlike the French law which explicitly provides for the monism. Article 55 of the French Constitution provides that *Les traités ou accords régulièrement ratifiés ou approuvés ont, dès leur publication, une autorité supérieure à celle des lois, sous réserve, pour chaque accord ou traité, de son application par l'autre partie.*

[1681] Apart from the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights (which Rwanda acceded to on 12/2/1975) Rwanda is a party to the following Human Rights Instruments with the date of accession or ratification presented in brackets: Convention on Elimination of All Forms of Racial Discrimination 1965 (12/2/1975); Convention on the Suppression and Punishment of the Crime of Apartheid 1973 (10/11/1980); Slavery Convention 1926 as amended by the Protocol 1953 (18/7/1927); Convention on the Elimination of All Forms of Discrimination Against Women 1979 (10/11/1980); Convention on the Punishment of War Crimes and Crimes Against Humanity 1968 (12/2/1975); Convention on the Punishment of Genocide 1948 (12/12/1975); Convention and Protocol Relating to the Status of Refugees 1951 (22/10/1979); Convention on the Political Rights of Women 1952 (22/10/1979); African Charter on Human and Peoples' Rights 1981 17/5/1983); and the Convention Governing the Specific Aspects of Refugee Problem in Africa 1969 (22/10/1979). See Centre for Human Rights, Status of International Instruments (UN, 1987); Codes et Lois du Rwanda, Vol. I., 1995.

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It is submitted that the new bill of rights should be elaborated in such a way as to prevent the government from passing amendments aimed at undermining it. The present procedure by which any constitutional amendment can be passed as long as it is approved by two-thirds of the members of parliament, is clearly inadequate, especially since it is easy to obtain the two thirds from the ruling party. Given the history of repeated abuses of this procedure by the successive regimes it would be best to require that any proposed amendment of the bill of rights should be initiated by a special commission comprising an equal number of Hutu and Tutsi members of parliament and approved by the people in a fairly conducted referendum.

The new bill of rights should also enshrine non-justiciable Directive Principles of State Policy based on the Indian model and establish the Ombudsman institution.

3.9.5.2 An independent human rights commission

It has been noted that the Rwandan government appointed a human rights commission in February 1999. A number of Rwandans have criticised this appointment as "one-sided",[1682] "partisan",[1683]and "*émanation du FPR*",[1684]while The Netherlands' delegation concluded that "it is not independent, whence the lack of investigative power concerning government services and officials, and the power to offer guarantees to witnesses.[1685] This criticism was based on the assumption that Rwanda had disagreed with the UN Human Rights Commission, which Rwandan authorities qualified as "investigative".[1686] According to Rwandan authorities, the UN should concentrate their work only on human rights promotion by education and thus should not investigate abuses. The disagreement resulted in the deportation of the Commission's agents and in the closure of their office in Kigali and the subsequent appointment of the Rwandan Commission.[1687] Without going into details, this controversial view on the appointed Commission is suspect, and thus, its work is not likely to produce positive results for all Rwandans.

[1682] See "Letter to the Rwandan President" written by Rwandan members of 'Zambia-Rwanda Friendship Association', 10/3/1999.

[1683] Kamanda, B., 'A Human Rights Commission?', *Rwandafor*, 1 June 1999.

[1684] Rugege, 'A Human Rights Commission?', *Rwandafor*, 2 June 1999.

[1685] Rudakubana, G., Main Findings of The Netherlands Delegation to the Great Lakes Region, Rwanda and Burundi, Rwandanet, 26 August 1999.

[1686] Radio Rwanda, News bulletin, 19 April 1998.

[1687] HRW Report 1998.

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Given the rampant human rights abuses that have occurred in Rwanda since independence and the failure of the majority of victims of such violations to obtain redress for various reasons, it is suggested that a permanent and reliable human rights commission should be created. Its main function should be to investigate human rights abuses and to investigate how far law enforcement agencies respect the rule of law. It should have broad inquisitorial powers, including power to seize documents, conduct a search, subpoena witnesses and to issue warrants of arrest for failure to comply. Moreover, it should have power to sue human rights violators and to publicise the results of its investigations. In this way those whose rights have been infringed but lack the means to challenge the violations will be assisted.

The Commission should be independent and its members should be nominated by a variety of independent bodies such as the *Barreau National du Rwanda*, women's organisations, the Church, trade unions and other civic and human rights organisations and should enjoy security of tenure equivalent to that of Court of Appeal judges. Further, its members should be immune from criminal prosecution during and after their tenure of office with respect to their work in the Commission. It should be funded by the government and by private national and international donors.

Such a commission will operate alongside the Ombudsman, who should continue to receive and investigate complaints of official maladministration or abuse of office.

The suggested Commission should play a significant role in checking human rights abuses and ensuring that the people responsible for the abuses are brought to account. It could also play an important role in educating the public about their rights.

A few countries in Africa, such as Uganda, Togo and South Africa, already have Commissions with some of the features outlined above. In Uganda, for example, an Inspectorate of Government was established by the Inspector-General Statute in 1987.[1688] Its functions are: to inquire into allegations of human rights violations, particularly arbitrary killings, arbitrary arrest and detention, denial of fair trial, torture and unlawful acquisition of or damage to property; to investigate how far law enforcement agencies respect the rule of law; to detect and prevent corruption; and to investigate maladministration and abuse of office.[1689]

[1688] Inspector-General of Government Statute, Statute 2, 1987.

[1689] Id., par. 7.

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Although the Inspector General has extensive inquisitorial powers[1690] his effectiveness is compromised by his lack of independence from the Executive, and the fact that the results of his investigations are cloaked in secrecy. He is appointed by the President, to whom he submits regular reports, covering each inquiry, together with his conclusions and recommendations. The reports are confidential and are not released to the Public. The Legislature only receives summaries of the reports every six months, with names of the investigated officials omitted. Moreover, the President has power to terminate any investigation if he thinks that it may prejudice national security or involve the disclosure of cabinet secrets.[1691] For these reasons the Ugandan scheme, in its present form, would not therefore be a good model for Rwanda. Instead, the South African model would fit.

In South Africa, the Human Rights Commission is an independent institution subject only to the Constitution and the law. "No person or organ of State may interfere with its functioning".[1692] It is accountable only to the National Assembly, and must report on its activities and the performance of its functions to the Assembly at least once a year.[1693] Its competence goes further than that of the Ugandan Inspector General. It has to promote the observance of, respect for and the protection of fundamental rights. It also has to make recommendations to organs of State at all levels of government where it considers such action advisable for the adoption of progressive measures for the promotion of fundamental rights. It may also recommend appropriate measures for the further observance of such rights. Moreover, it has to undertake studies relating to fundamental rights which are considered advisable for the performance of its functions. It is also empowered to request any organ of State to supply it with information on any legislative or executive measures, which it adopts, relating to fundamental rights. If the Commission is of the opinion that any proposed legislation by a legislature might violate fundamental rights, it has to report that fact to the said legislature. It is also competent to investigate on its own initiative, or after receiving a complaint, any alleged infringement of fundamental rights. If the Commission is convinced that there is substance in the complaint, it has to assist the complainant and other persons adversely affected thereby, to obtain redress. It may also arrange for, or provide financial assistance to enable proceedings to be taken to a competent

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[1690] Id., par. 8-9.

[1691] Id., par. 12. For an insightful discussion of how the Ugandan Inspector-General has fared in practice and how other human rights Commissions in Africa operate, see Richard Carver, The role of the Inspector-General, 1987.

[1692] Read Constitution of the Republic of South Africa, 1996, Section 181, (2), (4) and (5).

[1693] Id. The Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power to investigate and to report on the observance of human rights; to take steps to secure appropriate redress where human rights have been violated; to carry out research; and to educate. Id., Section 184, (2).

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court for relief.[1694] Each year, it must require relevant organs of State to provide the Commission with information on the measures that they have taken towards the realisation of the rights in the bill of rights concerning housing, health care, food, water, social security, education and the environment.[1695]

Furthermore, a Commission on Gender Equality is provided for by the South African Constitution. Its purpose is to promote gender equality and to advise and to make recommendations to parliament or any other legislature on laws or proposed legislation which affects gender equality and the status of women.[1696] There is no doubt that a commission of this kind would have an important role to play in Rwanda owing to the rampant discrimination against women studied in Chapter two.

3.9.5.3 Education

As pointed out earlier, one of the most serious obstacles to the protection of human rights in Rwanda has been the fact that most of the people are ignorant of their rights. However, education has a direct relevance to democracy and human rights. It is the educated who have time for discussing political issues, who will worry about freedom of speech or assembly and other freedoms or who will be critical of what the government does. The illiterate and semi-literate are too concerned with bread-and-butter issues to have time to take an active interest in political issues. This does not mean that they do not have an interest in politics; it simply means that lack of education inhibits their political awareness and participation. Illiterate or semi-literate people often do not know what their rights are or how to exercise those rights. Instead they have to rely on the educated and knowledgeable for this purpose.

If the educated are government officials like those referred to in this dissertation, they may mislead the illiterate and ignorant people who do not know their rights. As more than 65% of Rwandans are illiterate, they need to seek guidance and advice from those who are in favour of the promotion of human rights and democracy. This does not mean that all educated people know their rights and how to exercise them. They are, however, in a better position to seek knowledge about those rights and to exercise them. It is therefore necessary that there are courts to enforce rights once violated or threatened with violation, and also specialised commissions to promote the protection and observance of human rights.

[1694] Id., Section 184, (5).

[1695] Id., Section 184, (3).

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Clearly, there is need for a massive campaign to educate people about their rights. A lesson from the African experience is that the provision of a bill of rights does not automatically lead to its success in practice. To tackle that problem for Rwanda, people should be educated about a bill of rights and its provisions. They have to be educated concerning the meaning and the role of a bill of rights. Such a campaign could be conducted through seminars, public meetings, workshops, symposia, radio programmes, TV and the print media. Workshops on the various aspects of a bill of rights should involve lawyers, both practising and academic, magistrates, judges, politicians, government officials and lay people. With regard to magistrates and judges, emphasis should be on the approach to the interpretation of a bill of rights and legislation in general which has an impact on a bill of rights. In educating the public concerning a bill of rights, people have to be informed of what rights they have and on how to have those rights enforced. This education is needed because Rwandans have not lived under a bill-of-rights dispensation, whence they have to acquaint themselves with this new dispensation.

The idea of democracy and a bill of rights must be inculcated in young people at an early stage. Democracy and democratic values take a long time to strike root. In this regard, human rights should be incorporated in the curricula of educational institutions at all levels. That is, education about a bill of rights should not simply end at school. The university could obviously incorporate a course on it, either in constitutional law or as a component of a course on human rights. Not only should the university offer a course on a bill of rights, but the provisions of a bill of rights will have to permeate other courses as well, as in the United States of America. It will result in the constitutionalisation of the law. Whereas, according to the traditional conception, the law was based on "private law", the law of the Constitution must become the very centre of the legal system under the new conception.

Human rights also ought to constitute a strong component of the training given to the police and other branches of security. The *Bareau National du Rwanda*, the University of Rwanda's Law Faculty, the Church, the Trade Union Movement, the press, and other organisations concerned with human rights could play an important role in this campaign. International human rights organisations such as Amnesty International, the Lawyers Committee for Civil Rights, Africa Watch and the International Commission of Jurists, etc., could be of great assistance in this endeavour for they have both the expertise and financial resources that the program would entail.

[1696] Id., Section 184, (6).

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There also is need for private citizens to form human rights advocacy organisations similar to the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Coloured People (NAACP). Such organisations could play an invaluable role in human rights education and challenge human rights violations perpetrated against the most vulnerable sections of the population.

Finally, there is need to formulate the Constitution's provisions in non-technical language so that the majority of the people can have access to it.[1697] At the moment all the laws, including the Constitution, are written in highly technical language.

3.9.5.4 A legal aid department

Included in the Rwandan bill of rights is the idea that all people shall be equal before the law without discrimination. This is all very well as an idea. But it does not mean much if the people who have these equal rights do not know what their rights are or how the law affects them in their dealings with other people, the government, businesses, etc.

As seen, the law itself can be quite complicated and involves many areas of life. So, in a case between two people, or between a person and a company, it may be that the person who is represented by a lawyer in court has an advantage over the person who does not have a lawyer to represent him. A further problem is that lawyers charge for the time they spend on a case and the majority of people cannot afford their services. Thus, the majority of people who are arrested and appear in the criminal court are not represented and a number of them are even sentenced to death. Also, many people are not able to go to a civil court to get their money back or their rights enforced.

There is urgent need for the establishment of a legal aid department to provide assistance to people who cannot afford to pay a lawyer. In order to be more effective, the department should have enough staff and should post lawyers to every commune, and people should be taught how to make use of these services. This would naturally involve a significant increase in funding. Money for this can be found, provided the government is committed to the protection of human rights. At the moment significant amounts of money are being wasted on defence, invasion of the Democratic Republic of

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[1697] In Namibia, e.g., the Legal Assistance Centre has issued a booklet entitled "Know Your Constitution: The Republic of Namibia March 1990", which explains the various provisions of the Constitution, including the bill of rights, in very simple, non-technical language. The booklet has been translated in all the major African languages. See Legal Assistance Centre, Know Your Constitution, The Republic of Namibia, Windhoek, March 1990.

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Congo and a bloated bureaucracy. The international community could also be asked to help with funding.

The University of Rwanda's Law Faculty could also set up a Legal Aid Clinic. Such a Clinic could, apart from increasing access to legal services for people who cannot afford lawyers, provide an opportunity for law students to gain practical experience in helping indigent people at an early stage of their career. Such clinics have been set up in many Universities in other countries.[1698]

As indicated elsewhere in this dissertation only the *tribunal de première instance* and the *Cour d'Appel* can hear and determine cases arising under the bill of rights. But there are not enough judges and courtrooms to cover all the criminal and civil cases that arise. Moreover, the bulk of judges are located in towns. From time to time these judges travel to communal capitals to hear cases. That means the majority of the people who live in rural areas have virtually no access to the *tribunal de première instance*. It therefore goes without saying that the *tribunal de première instance* should be expanded in terms of personnel and infrastructure. The ideal situation would be to station a *tribunal de première instance* in each of the 150 communes in the country and a *Cour d'Appel* in each of the 12 prefectures.

3.10 Conclusion

The genocide has created a new type of State in Rwanda, a State marked by two convictions. First, the post-genocide State considers itself morally, though theoretically in some cases, responsible for the safety and security of every living Tutsi. Second, this State believes that the pre-condition for Tutsi survival is Tutsi power. That is, if the Tutsi lose power, they will also lose life. In this sense, the post-genocide State is an ethnic security State.

The practical implication of this is that if Tutsi power is indeed the pre-condition for Tutsi survival, then Tutsis and Hutus will continue to be reproduced as separate and even antagonistic political identities in Rwanda. In that case, the only peace possible between Tutsis and Hutus will be an armed peace. This seems, indeed, to be the case now.

[1698] For example, at Stellenbosch University, the Law Faculty links law students with individuals in need of legal help who are too poor to afford private attorneys. Students, supervised by Faculty Professors and participating attorneys, interview clients, write briefs, and prepare witnesses. Stellenbosch Legal Aid Clinic, interview, 1998.

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Moreover, those called upon to take decisions –or to elect the representatives who are to take decisions- will not be offered real alternatives and will not be in a position to choose between these alternatives. There will still be violation of such basic rights as life, liberty, freedom of opinion, of expression, of speech, of assembly, of association, etc. These are, however, "the rights on which the liberal State has been founded since its inception, giving rise to the doctrine of the *Rechsstaat*, or juridical State, in the full sense of the term, i.e. the State which not only exercises power *sub lege*, but exercises it within limits derived from the constitutional recognition of the so-called 'inviolable' rights of the individual".[1699]

The other crucial fact is that when the RPA crossed the border into Rwanda, it lost its political innocence. There were hardly any people in the 'liberated' areas because the very peasants they claimed to 'liberate' were running away from them. They could have remained in exile should not they have been repatriated forcefully under the complicity of the UNHCR, thus violating international law. Henceforth, liberation for the RPF meant not the liberation of people, but of territory.

However, this dissertation has showed that the world of Hutus and Tutsis, of northerners and southerners, was less a world of two different cultures, not even a world of poverty and wealth. It was, first and foremost, a political world. Yet, Hutu and Tutsi exist not as market-based identities, nor as deeply cultural identities, but as political identities.

The tension that characterizes post-genocide Rwanda resembles more a volcano than anything else. The sequence of events from the early 1990s, in fact, seems to indicate a trend that is bound to place the country quite beyond the reach of democratization. The distinction between order and anarchy is more fundamental than the one between democracy and dictatorship. The former is inextricably bound up with the latter. Rwanda, as some other African countries, appears to hover on the edge of anarchy, quite remote from any democratic threshold. The spectacular and catastrophic explosions of domestic violence in 1994 reveal the collapse of the very institution that is required to maintain this order –the State. Developments such as those analyzed in this dissertation do raise the question of whether Rwanda can be expected to produce any truly significant change towards a democratic constitutional State.

In the author's opinion, should we assert that in every true democracy, fundamental rights and freedoms –especially political rights- ought to be guaranteed. After all, a democratic political system presupposes that individuals can express themselves, that they can exercise their right to vote, to demonstrate, to associate, etc., in order to prevent the momentary majority to force its will upon dissidents and relapse into tyranny. Democracy presumes the existence of people with differing

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[1699] Bobbio, N., The future of Democracy, A Defense of the Rules of the Game, Oxford, 1987, p. 25.

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opinions, minorities. In other words, in every democracy the positive freedom of individuals is guaranteed by way of individual freedoms, which allow people to participate in the political system (the same holds true for groups). The individual (and the group) should have the opportunity to express himself, to unite and to assemble with others for a common purpose. In this case only though, can the minority of today become the majority of tomorrow. Only when individual rights and freedoms –that are presupposed in a democracy- are constitutionally entrenched, can individuals really claim these rights. We should keep in mind though, that the individual is playing different roles in diverse situations: employee, voter, concert-lover, etc. Because of this, he will be a member of another minority or majority every time he accepts another role. Democracy, from this point of view is not static; it is made up of constantly changing majorities and minorities. At last, then, the State's obligation under human rights law requires them to assist all inhabitants in enjoying their human rights, and to fulfill their justified claims as spelled out in human rights instruments. This means that equal enjoyment of human rights must be achieved through active legal regulation and its administrative implementation.

Clearly, the perspective on democracy that we have taken as a point of reference is constitutional democracy. Only when the decisions of the majority are also limited, can democracy as such exist (in other words: constitutional democracy is not an oxymoron). Not only is there the obligation to respect individual rights and freedoms, but there are also other notions included in the idea of constitutionalism: the conviction that all governmental power, even democratically legitimated power should be limited by law.[1700] In this notion, the negative aspect of freedom emerges; the individual is free to do whatever he wants, that is, he will not be thwarted by others.

In other words, constitutional democracy presupposes a negative view of human beings; the gist of constitutional pre-commitment is that the individual (in a community) should be guarded against herself. At the same time, however, by binding themselves to a Constitution, human beings can realize a form of self-government. From this point of view, constitutional democracy also expresses a

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[1700] This view on constituonalism and democracy is also held by Kanté, who writes that: "constituonalism is the expression of the attachment of a political society to legal mechanisms which determine its organization and performance. These mechanisms serve in principle as instruments for the political power, yet at the same time they correspond to a specific area in which individual rights and freedoms should find protection. *Kanté, B., 'Le constitutionalisme à l'épreuve de la transition démocratique en Afrique' in Zoetbout, C.M. et al. (eds.), Constitutionalism in Africa – A quest for autochthonous principles, Gouda: Sandars, 1996, p. 17-32.* Jembere underlines the close relationship between constitutionalism and democracy: 'Constitutionalism is, in brief, a method by which the democracy purposefully guides its activity in the light of certain expressed principles, and restricts its own actions now and in the future. Constitutionalism was surely meant as a limitation on the unbridled exercise of legislative power. And by that very fact, it was also a conscious limitation on the ordinary power of the popular will itself.' *Jembere, A., 'The functions and development of parliament in Ethiopia' in Zoetbout, C.M. et al. (eds.), Constitutionalism in Africa – A quest for autochthonous principles, Gouda: Sandars, 1996, p. 63.*

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positive view of mankind. We may regard it as a combination of correlative concepts rather than a conjunction of apparent contradictions.

What is intriguing, but not entirely surprising, however, is that attempts to re-enact fresh constitutions in Rwanda showed no clear understanding of what the necessary and sufficient principles of a constitutional order should be. Repeatedly, what the rulers came up with were remarkably similar to what they were rejecting. The exception always was that the power structure in the new Constitution was carefully re-arranged so as to remove the fetters upon central authority that characterized the old. Competition has been ruled out through the establishment of the one-party State.

The result is that constitutional structures became dangerously perched on a coercive legal and administrative order. Appeal to constitutional structure by ruling elites, thereafter, has been made only if it reinforced their own narrow view of State power. In other words, the constitutional structure has been quickly turned into a shield for the protection of elite interests, rather than a framework for the enhancement of human rights and the rule of law.

There is no doubt that the general public needs a new political order different from this perverted. What they hope for is, at the very minimum, a less oppressive, more distributive, and economically proactive system, than has been in existence under previous regimes. What they have ended up with after nearly 38 years of independence has been a country reeling under the burden of broken promises and a shattered economy and constitutional structures without any normative content.

The hindrance of civil society has not changed. Indeed, organs of civil society have not, in the last several years, been given opportunity to force themselves into the arena of politics as regards especially, the formulation of the overall national agenda for social, economic and political development. Should they have flourished, they could have gone further and asserted the right to call the State and its organs to account in respect of policies, practices and activities that may be considered injurious to the social welfare. Their entry point, hence basis of legitimacy, as political agents, could have been the realization that development is in a very real sense, a function of political relationships.[1701] They could have thus sought and demanded that the State should create an enabling environment for development though, *inter alia*, responsible political behavior, fidelity to rules, respect for human rights, economic policies which minimize resource wastage due to bureaucratic excesses, and transparent government.

Important to note is also the need to establish a distinction between State and regime in Rwandan politics. In organizational terms each should be insulated from the other, so that a distinctive corporate character can emerge in the ranks of the personnel who occupy the positions within these

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[1701] Buijtenhuijs, R., Rijnierse, E., Democratization in Sub-Saharan Africa (1989-1992), An Overview of the Literature,

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respective sites. Personnel of departments, agencies, and bureaux within the State, which are organizationally separate from the regime, need to develop a sense of autonomy and distinctiveness that matches and reinforces the organizational insulation between State and regime, once it has been established. A change in regime format and the regular personnel within the regime should not threaten, nor should it be seen to, the occupants of the other sites within the State. A position within the regime, and a position within the State outside the regime, should constitute two distinct career trajectories, and should be seen to do so.

Such an institutional and perceptual demarcation within the State lays the basis for effective democratization of the regime. The other step is to establish constitutional rules which give effect to the principle of citizenship of equal value; secure the civil and political liberties in terms of which participation and contestation are delimited; and ensure that these rules remain functional within the contours of societally based political loyalties that characterize an ethnically divided society.

The steps analyzed here and elsewhere in this dissertation entail the construction of an institutional and attitudinal arena within which the voluntary organizations that make up the contending 'civil' societies, so typical of a divided society, can be merged into a civil society. The contest for hegemony, as conceptualized, provides a framework within which it is possible to return to the questions raised by *Chazan* on the role of civil society in the process of democratization.

The question raised (but not answered) by *Chazan* is which voluntary, grassroots organizations can be expected to qualify as building blocks for a civil society that can be congruent with and supportive of democracy.[1702] The answer is that no organization that aims to represent only the interests of people who consider themselves members of an exclusive incipient whole society can qualify. The pursuit of hegemony is exemplified in the organizational imperatives contained in the endorsement or denial of group status and esteem; in the imposition of one vision of peoplehood, statehood and constitutional rules to the exclusion of all other such visions; and in the discriminatory distribution of public goods. Politics of this nature have precluded the emergence of an inclusive view of the public interest or the common good from which the notion of a society-wide context for the conduct of civility could have grown in Rwanda.

The attitude of the donor community have not given impetus to reconstruction of the State along more constitutionalist and democratic lines despite the fact that donor communities, their agencies and the Betton Woods institutions, particularly the International Monetary Fund, have, in the last few years insisted that African countries should, *inter alia,* adopt transparent and responsible political

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Leiden: African Studies Center, 1993.

[1702] Chazzan, N., 'Africa's Democratic Challenge', *in World Policy Journal*, vol. 9, no. 2, Spring 1992, pp. 279-307, at 295.

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behavior and undergo political change. It is generally assumed that donor countries that, in the past, had provided the main backstopping support for repressive regimes in Africa, suddenly realized that democratic values were universal phenomena and that it was their moral duty to propagate them on the international plane. But it is also likely that change in donor policies may well have been motivated by the desire to globalize the market economy. Be it as it may, no concrete action has been taken as far as Rwanda is concerned. The strategies that the donor community should have used should have included threats of/or actual aid freezes, proactive diplomacy, observation, monitoring and reportage of significant political events. These strategies could have been effective in reducing the level of political excesses in Rwanda. The author believes that with external pressure positive changes could have occurred. It is, *inter alia*, the lack of such strategies that ethnic antagonism remains the main threat to reconstruction.

The collapse of the State as constituted at independence led inevitably to the desire for its reconstruction. But analysis in this dissertation showed clearly that ruling elites in Rwanda have been incapable of or unwilling to undertake serious self-diagnosis. They could not, therefore be relied on to create an enabling environment for the growth of the essential principles of a viable constitutional and democratic order. The reconstruction of the State, therefore, will require the intervention of new social forces, the emergence of alternative paradigms, and the design of endogenously propelled institutional arrangements. Policy makers are urged to aim not only for the establishment of a democratic regime, but also to work for maintaining, or creating, a strong and autonomous State during the process of reconstruction.

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General conclusion

4.1 Summary

This dissertation has shown that ethnic polarisation in Rwanda, regardless of whether the majority or minority are in power, has prevented the development of a stable nation-state and has existed in symbiotic relationship with ever-increasing human rights abuses. Colonisation itself and the mismanagement of the de-colonisation process by the Belgians did not allow the elements that form the bedrock of a functioning democracy - an organised opposition, an independent parliament, freedom of expression, and freedom of association and assembly - to flourish. Although republican leaders guaranteed the independence of the judiciary on paper, their one-party ethnically based system did not allow it to play its customary role of being the sentinel of liberty because of the atmosphere of fear that pervaded the entire society.

The perversion of democracy was the most striking feature of the 37 years of absolute and harsh rule in Rwanda. Both the party and government have been completely dominated by strongmen who ran the country much the way they pleased. All effective power in the country was surrendered to them. The majority of the people were completely shut out of the political system. The rulers were not accountable to the people because of the absence of free and fair elections and the severe limitations placed on freedom of expression, and freedom of association and assembly.

Indeed, the bill of rights was extremely weak and so was its implementation. Thus, human rights were violated on a wide scale during the period under study. The practice shows that post-independence leaders learnt no lesson from the pre-colonial and colonial period. The post-colonial State was not committed to upholding the rights guaranteed in the bill of rights in the post-independence period.

Early colonial policies interacted with features of the pre-colonial Rwandan system to perpetuate caste stratification and exploitation. While policies were formulated as if there still was a passive population accepting a premise of inequality, the colonial experience inadvertently created a small Hutu elite equipped to protest against inequalities in the system.

Cleavages between the castes existed prior to colonial rule, but these cleavages were exacerbated under the colonial regime. Belated recognition of the problem of caste stratification, rather than stratification *per se*, created obstacles to democratization during the 1950s.

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Since Tutsi superiority had been unquestioned before the advent of UN pressures, the Tutsis had been given no incentives to co-operate with Hutus; the Hutus had been given no opportunity to participate in high political positions and thereby gain a stake in the system. The Tutsi elite and the small Hutu elite had little basis for mutual understanding.[1703] When external pressures made introduction of reforms unavoidable, none of the prior changes had prepared the system for democratization. Since little had been done earlier to reduce exploitation in the system, the Tutsi feared that loosening political constraints over the Hutu would lead to the end of Tutsi hegemony. Thus, Tutsis expected the worst consequences from granting voting power to Hutus. Both Belgians and Tutsi had misgauged the amount of time remaining for procrastination. The UN pressures made correction of inequalities imperative, but no one was ready for reforms except the Hutu protesters who had been deprived of any experience in democracy. That is why they did not fully appreciate the importance of respecting individual rights and freedoms. This was because colonial rule was characterised by authoritarianism, absence of democracy and rampant violations of human rights. But the Tutsis did not do better when they seized power and it is not surprising that they have shown such scant regard for individual rights and freedoms. The bill of rights has not been effective, partly because the State has not been fully committed to it.

During both regimes, once the obsolete 'oppressors' were liquidated, new ones were immediately put in place, without leaving the oppressed much time to breathe. And the new boys were in fact of a much better model than the previous ones. First of all, they had been oppressed for a long time, and now they were 'liberated'. It would have benefited the entire society if they had remained more polite and properly subservient than the old oppressive bunch who were often insolent and thought themselves irremovable. Now neither had any more to fear. On one side, the 'revolution' had been carefully stage-managed, the former victims had all been told that they were now free by decree, and a perfect 'democracy' reigned, since the *rubanda nyamwinshi* (the 'majority people') were now supposed to be 'in power'. On the other side, the '*génocidaires'* had to be kicked out, killed and/or kept under control.

As for the mechanics of the genocide, one should mention the unquestioning obedience to authority, fear of the Tutsi 'devils' and the hope of grabbing something for oneself in the general confusion. This is exactly what happened when the Tutsis seized power and it is not surprising that the fear of the Hutu '*génocidaire'* and the illegal occupation of properties subsist. The genocide and other gross

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[1703] Even their educational experiences had been gained from different institutions: Tutsis tended to be educated at the Astrida Administrative School, whereas the majority of the Hutu elite attended Nyakibanda Seminary. Newbury, *The Cohesion of Oppression*, p. 85.

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human rights abuses from either side happened not because the State was weak, but on the contrary, because it was so totalitarian and strong that it had the capacity to make its subjects obey any order absolutely, including that of mass slaughter.

The new government has not adhered to its promise to protect human rights. Massacres, assassinations, abductions, and detentions without trial, and arbitrary searches are still commonplace. It should be observed, however, that the installation of a new government, by itself, is unlikely to lead to the elimination of human rights abuses. The new government has inherited all the institutions, including but not limited to the hated secret police which has been reinforced in such a way that no undesirable element can escape. The bill of rights remains exactly the same as before, both in form and content. However, the judges appointed by former regimes have been swept out or assassinated or have gone into exile, and senior positions in the cabinet, civil service and the diplomatic posts are filled with RPF associates, some of whom have probably participated in human rights abuses. Although an independent press has been allowed to operate, the main daily papers and radio and television are still owned by the government. The opposition has been suppressed and given its overwhelming parliamentary majority, the RPF government can pass virtually any legislation it wants. In a way the RPF is in the same powerful position as MRND was during the Second Republic. In the final analysis, therefore, nothing much has changed in substance.

During both Hutu and Tutsi regimes, the executive was vested with enormous security powers, which were not subject to effective controls. Emergency powers frequently were grossly abused. Not only were they used to suppress political dissent so as to maintain the grip on power of MRND's and RPF's strongmen, but they also subverted the ordinary criminal process. It was much easier to resort to detention without trial and to assassinations to silence opposition than to compete for power in free and fair elections. As for suspected criminals, why bother with long, tedious and expensive investigations when they could be detained without trial?

The fact that the courts in Rwanda, like those of many other countries in Africa, did not interpret the procedural safeguards in favour of detainees in the tiny number of cases submitted to them was aggravated by their refusal, in the majority of cases, to inquire into the merits of the detention. Thus, only the failure by the State to conform to the procedural requirements could result in the release of a detainee, but this relief was of dubious value because the State, in most cases, would merely issue a new detention order, correcting the initial flaw. Thereafter, the courts could not intervene on account of their self-imposed restraint. However, the courts alone, no matter how determined to protect individual liberty they may be, cannot provide a panacea. The content of the laws that the

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courts must interpret is very important. If the laws bear down heavily on detainees and preclude judicial review of executive action, the courts are paralysed and cannot effectively protect personal liberty. However, where the legislation is vague, the courts can live up to their assigned role as sentinels of individual liberty. The judiciary did not strive to strike a balance between the competing claims of national security on the one hand and those of individual liberty, on the other.

Furthermore, the courts in Rwanda, like their counterparts elsewhere, are constrained by many limitations, some of which are self-imposed, and others which are inherent in the judicial function itself. Moreover, the quality of some of the judges on the Bench has left much to be desired (in terms of intellectual acumen, training and commitment to human rights). The ineffectiveness of the judiciary has been reinforced by the absence of an organised bar for a long time and by the newly established bar to stand up for human rights.

However, it must be recognised that since judges are part of society they can only be effective if the society in general appreciates the need to preserve and protect individual rights. Courts will not be effective defenders of rights in the absence of political pluralism, a free press and an alert public that is conscious of its rights and is willing to fight for them. These conditions were absent in Rwanda during the whole period under review.

History shows that human rights have been most vulnerable in societies that are torn by ethnic conflicts, as well as those facing economic ruin, as is the case with most of the countries of the Third World and East Europe. On the other hand, human rights have generally been better protected in the Western industrial democracies, which have highly developed economies and generally well-integrated societies.[1704]

To some extent, human rights in Rwanda have been adversely affected by economic and social factors, some of which were legacies of colonialism. The high levels of poverty, illiteracy, and disease, and fear of instability arising from ethnic rivalries, have created a hostile environment for the protection of human rights.

The ability of the people to challenge wrongful action by the government has been constrained by two factors. First, due to the high level of illiteracy coupled with the fact that there is no national programme to educate people about their rights, most people are ignorant of their rights. A person will only take legal action against the government if he knows that his rights have been violated.

[1704] Sullivan, Democracy and Global Economic Growth, 15 Washington Quarterly 172, No. 2, spring 1992.

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Second, most people have been prevented by poverty from challenging the government for infringing their rights. If people do not have money to feed and clothe themselves and to send their children to school it is unlikely that they can afford to hire a legal practitioner to take up their cases. As shown, legal aid has not been provided by the government. Moreover, there has not been a single human rights organisation to help indigent people to take their cases to court.

The policy of centralization has established institutions that have worked in a way that hindered, stifled, and even eroded broadly based human development in Rwanda. It attempted to preempt and erode the local social "tools" or "technologies" of human action; it thus weakened the diverse small-scale organizations needed for development. As centralization progressed in the post-independence era, Rwanda moved to restrict the ability of non-central-state actors to authoritatively allocate values, to engage in extra-state social organizations, and to engage in private economic pursuits.[1705] Labour unions, cooperative organizations, local governments, education, and voluntary organizations were incorporated into the ruling party. Their roles as rule-governed organizations to structure complex human relationships, to sustain "self-organization" were restricted. Their capacity to serve as arenas and structures through which new rules might be developed and new forms of organization might be spawned was similarly hindered.

The policy of centralization has been an important instrument to keep the Hutu-Tutsi and regionalism problems unsolved, whence the perpetration of genocide and other gross violations of international human rights law. There is great fear of the opposite ethnic group. Tutsi srefuse to give up their control of the army because they see it as a form of security against genocide. Hutus cannot imagine a stable democracy as long as the Tutsis control the army and security forces, occupy the urban areas, own most business, and dominate the government and justice system. The total failure of the ICTR and Rwandan domestic courts to produce anything like a recognisable modicum of justice with regard to the genocide, war crimes and crimes against humanity has reinforced the complementary attitudes of extremists from both ethnic groups. For the Tutsis it is "we have our backs to the wall. Unless we maintain absolute control they will finish us next time." And for the Hutus: "We only have to wait, numbers will play in our favour and the so-called international community will neither want nor be able to stop us".[1706] Under these conditions, there is little or no hope for equal rights and

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[1705] Bates, R., Markets and States in Tropical Africa: The Political Basis of Agricultural Policies (Berkely: University of California Press, 1981); Mawhood, P., ed., Local Government for Development: The Experience of Tropical Africa (Chichester: John Wiley, 1983); also compare to Hyden, G., Beyond Ujamaa in Tanzania: Underdevelopment and an Uncaptured Peasantry (Berkeley: University of California Press, 1980)

[1706] Prunier, Rwanda: The Social, Economic and Political Situation, at 9.

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justice for the near future unless moderate Rwandans from both sides are given the opportunity to negotiate with extremists so as to set up a viable State.

4.2 Recommendation

It is apparent that a number of measures need to be taken to improve the protection of human rights and the rule of law. It is not suggested that all problems will be solved if human rights were protected in Rwanda. Many specific suggestions have been made throughout the dissertation and some of them will be repeated here for emphasis. Through the analysis contained in this dissertation, the conclusion is that a certain kind of strong autonomous State[1707] is a necessary, yet insufficient, condition for sustaining democracy. State strength and autonomy should be added to the studied preconditions.

As regards truth and reconciliation, the intriguing dilemma is not to specify the conditions which enable a sound judgment to be made concerning which outcome will result from the bargaining process. It is rather to specify the empirical conditions of, and prescriptive guidelines for, inducing adversaries to engage one another in good-faith bargaining, given that they would prefer not to.[1708] The problem thus restated implies that the necessary conditions for bargaining over hegemony in Rwanda are more stringent than over other issues in different contexts. It implies first and foremost that the requirements of good faith be expanded to include the joint acceptance by all parties to the conflict that hegemony for any one of them, be it Hutu or Tutsi, northerner or southerner, is unattainable. The present generation of Rwandan rulers seems not likely to agree on this issue. Another generation is thus needed that would acknowledge that the negotiating process is not to be used to try and secure unilateral victory on its own terms and unconditional submission by the others. Negotiation cannot be converted into a tactical device for imposing any one agenda onto other parties. Instead, all parties must accept that the aim of bargaining must be the precise

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[1707] The role of the State as a potential, incipient, partial and wholly de facto autonomous actor in dealing with ethnic conflict that emerges from society has not been well researched. The work of Donald Rothchild is the major exception. He examines the state-society relations in contemporary 'Middle African' states and finds a pattern of conflict management in which the State and a wide range of ethnic groups engage in a process of hegemonial exchange: "As an ideal type, hegemonial exchange is a form of State-facilitated coordination in which a somewhat autonomous central-state actor and a number of considerably less autonomous ethno-regional interests engage, on the basis of commonly accepted procedural norms, rules, or understandings, in a process of mutual understandings. Rothchild, D., 'Hegemonial exchange: An Alternative Model for Managing Conflict in Middle Africa' *in* Thomson, D.L. and Ronen, D., (eds.), *Ethnicity, Politics and Development,* Boulder, CO: Lynne Rienner, 1986, p. 65-104, at 72. See also Rothchild, d., 'State-Ethnic Relations in Middle Africa' *in* Cart, G.M. and O'Meara, P., (eds.), *African Independence – The first twenty-five years,* Bloomington: Indiana University Press, 1985, p. 71-96.

[1708] Compare to Du Toit, P., 'Bargaining about Bargaining – Inducing the Self-Negating Prediction in Deeply Divided Societies – The case of South Africa', *in Journal of Conflict Resolution,* vol. 33, no. 2, June 1989, p. 210-230, at 215.

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opposite: it must involve a joint endeavor to search for a mutually acceptable agreement on establishing a site of hegemony which is located beyond the exclusive control of any one of the bargainers.

The first suggestion is the need for the reconciliation of the Rwandan society and the construction of a viable State. An agreement between Hutus and Tutsis is of primordial importance in creating an environment that would avoid the rhythm of destructive relations culminating in ethnic violence and for promoting a sense of security and moderate politics. Having enjoyed a monopoly over power and access to the resources under the control of the State, Rwanda's absolute rulers have and will continue to resist the non-ruling ethnic group and the thrust of civil society organizations to expand the political space, unless a third class of non-extremist Hutus and Tutsis emerges out of strong negotiations between both ethnic groups. Consequently, a democratic transition *à la Rwandaise* is irreversible, but, due to the complexity of the particular ethnic issue, it is likely to be of long duration, indeed. Quick fixes cannot be expected for what appears to be a victory at some point may turn out to be nothing of the kind. What is important is the creation of a new political culture in which democracy may grow and be sustained, and political expression need not be confined to the State and political parties. Professional associations, NGOs, and independent mass organizations should flourish in order to challenge the *status quo* and help develop a viable civil society capable of limiting State power and of advancing the interests of the broad masses of the people.

In this context, emphasis is placed on the autonomy (and not on the independence) of civil society from the State: the State should lay down laws which set the outermost boundaries of the autonomy of the diverse spheres and sectors of civil society; so, civil society from its side should lay down limits on the actions of the State.[1709]

Tradition, laws and the Constitution should serve to demarcate and maintain the boundaries of this autonomous sphere. The criterion of civility serves as a yardstick for the conduct of relations amongst individuals and groups within society, and between individuals, social organizations and the State.

The perspective on civil society contained in this context can be explicated by means of *Migdal*'s model of state/society interaction in the process of state-building. First, not all strong societies[1710] are

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[1709] Shills, E., 'The Virtue of Civil Society', *in Government and Opposition, vol. 26, Winter, 1991, p. 3-20, at 4.*

[1710] Strong societies are those which exhibit a high level of social control. The social control which ensured State predominance in continental Europe entails specific dimension of State power, which *Mann* identifies as 'infrastructural power': the ability of the State to penetrate society and to use the infrastructure of the State to direct, and to co-ordinate societal actions. *Mann, M., 'The Autonomous power of the State: Its origins, mechanisms and results', European Journal of Sociology, vol. 25, no. 2, 1984, pp. 185-213. This dimension of State power is also identified by Lewis W. Snider in 'Identifying the elements of State Power – Where do we begin?', Comparative Political Studies, vol. 20, no. 3, October*

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civil, but all civil societies are strong. The civil conduct of both private and public affairs is an expression of a high degree of social control, which is maintained through tradition, laws and constitutional rules. The compatibility of this triad of sets of rules of social control not only ensures civility, but also indicates that a pyramidal structure of social organizations is operative, with the State at the apex of this pyramid, and where State and societal strategies of survival are congruent. Citizenship is first and foremost an indicator of an individual's formal membership of a State.[1711] It is also the crucial qualification from which the status of civic persons and the guidelines for the conduct of relations between them are derived. The existence of civil society requires that the status of citizenship be invested with a very specific substantive content. Although *Shils* restricts the notion of civility to the conduct of good manners, it can be given greater conceptual depth by linking the status of civic persons to the body of rules subsumed under the category of civil rights. These rights, which comprise a range of privileges, claims, duties and obligations individuals hold against the State,

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1987, pp. 314-356. Migdal argues that effective social control, thus defined, requires high capabilities from states to extract resources and the penetration of society. Successful social control is reflected by three indicators: compliance (getting people to behave differently from the way they would prefer to), participation (repeated voluntary action within institutions run or authorized by the State) and legitimacy (voluntary acceptance of the myths and symbolic imagery with which the State justifies its rules of behavior). These rules of behavior are constructed from rewards, sanctions and symbols which, taken together, offer *strategies of survival* that are supposed to be relevant to the particular conditions people have to confront in everyday life. The domestic hegemony of the State is secured when compliance with these survival strategies at the expense of those offered by rival social organizations can be attained. Non-compliance, on the other hand, cannot be explained only in terms of corruption, criminal intent or mental instability. It may also reveal a more basic conflict as to whose set of survival strategies is to be followed: those prescribed by the State, or those on offer from competing social organizations. *Migdal, Strong Societies and Weak States, p. 4, 5, 30-33.* Strong states are those with high capabilities. Consequently they are more likely to succeed in achieving this domestic hegemony. The measure of their success is the establishment of a unified network of social control. This is achieved by means of a universal set of rules which prescribes the conduct of relations between one individual and another and between individuals and the State. Indigenous law, if it is allowed to persist, is made congruent with the law established by the State. Thus a single political status, that or citizenship, valid for all who qualify as members of the State, is established. *Ibid., p. 41, 208.* By asserting this status by means of a single jurisdiction within its territorial boundaries, the State is able to assume hegemonic control over society and to dictate its own survival strategies to all within its domain. Weak State, with smaller capacities for regulation, extraction, appropriation and penetration, tend to fail in achieving these objectives. In consequence, other social organizations with their own survival strategies are likely to gain a competitive edge. The weak State exists alongside these rivals as but one source of political allegiance and loyalty, and individuals and groups can come under the compulsion of any one of a range of contending survival strategies. Social control becomes fragmented between these rivals and although a State may be acknowledged as having the juridical entitlement to claims of sovereignty (*Jackson, R.H., and Rosberg, C.G., 'Why Africa's Weak States Persist: The Empirical and Juridical in Statehood', World Politics, vol. 35, October 1982, p. 1-24)* (which reflects the hegemonic quality of statehood), the empirical embodiment of such a claim is absent: jurisdiction over the population and territory is multiple; the rules of the State are not universally applied; and citizenship is but one form of political status, not necessarily the most legitimate or most valuable. *Elements of Migdal's depiction of the weak State are contained in Gunmar Myrdal's earlier description of 'soft' states, where '...policies (which are) decided on are often not enforced, if they are enacted at all, and in that the authorities, even when framing policies, are reluctant to place obligations on people', Myrdal, G., Asian Drama: An Inquiry into the Poverty of Nations, vol. I, London: The Twentieth Century Fund, 1968, p. 66. Rothchild relies on Myrdal's definition of the soft State in his theory of hegemonial exchange.*

[1711] Krasner, S.D., 'Sovereignty, An Institutional Perspective', *in Comparative Political Studies,* vol. 21, no. 7, April 1988, p. 66-97 at 74.

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emerged not in abstract, but from specific conflicts in the process of European state-building.[1712] As State leaders yielded to these societal demands, essential adaptations to aspects of State organization and conduct followed. These changes were reflected in the emergence of citizenship criteria that reflected the demands, and in regime types that allowed for the execution of these demands. Civil society thus presupposes the salience of citizenship, which can emerge only when the State has succeeded in drawing the entire population within a single common jurisdiction, with a shared citizenship status and a law applicable to all. This requires the exclusion of contending political loyalties, which presupposes the hegemony of the State.

When civility is conceptualized in these terms it can serve as a definitional yardstick within which the substantive attributes of organizations which are considered to qualify for inclusion into civil society can be subsumed. The norms of tolerance, co-operation, accountability, openness, trust, respect for the rule of law within the organization and an appreciation of both procedural and substantive justice convey the substance of this broader notion of civility. They also serve as definitional criteria for differentiating from amongst a range of societal units with identical organizational profiles, the uncivil societies from the civil ones.

Rwanda has failed in meeting the criterion of civility because of the ethnic division of the society, and this runs counter *Shills*' contention that the essence of civility lies in the mutual recognition of the moral dignity of one's opponents in the course of public conduct:

> ... It means regarding other persons, including one's adversaries, as members of the same collectivity, i.e. as members of the same society, even though they belong to different parties or to different religious communities or to different ethnic groups.[1713]

Civil conduct in these terms presupposes a very solid sense of inclusive collective self-consciousness' that transcends other social cleavages and from which can emerge a shared notion of the common good, or public interest. This should be the objective to be attained in Rwanda; otherwise (in the absence of such civility), the country will remain in cycles of civil war, the very antithesis of civil society.

Internal conflict and violence between Hutus and Tutsis constitute the main threats to peace and security in Rwanda. This phenomenon is related to the search for a new social contract between the State and the society under its control. This involves the well being and security of all Rwandans. The number of refugees and rebellions has emerged in response to both the State's failure to meet these basic needs and its oppression of certain groups, particularly non-ruling groups and their

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[1712] Tilly, C., 'Reflections on the History of European State-Making' *in Tilly, C. (ed.), The Formation of National States in Western Europe,* Princeton: Princeton University Press, 1975, p. 38.
[1713] Shills, 'The Virtue of Civil Society', p. 13.

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relatives or affiliates. Just as it is likely to be sustained under conditions of peace and security, the democratic transition offers the best conditions for national reconciliation and social justice, which are the foundations of enduring peace and comprehensive security.

In this dissertation the author has not entered into all the details regarding the implementation of a possible truth and reconciliation initiative for Rwanda, but has, rather, sought to clarify the framework within which a project for such an initiative would need to be placed.

International (human rights) law must be respected, whether through a judicial or non-judicial approach. This, therefore, means that the principle of universal jurisdiction over acts of genocide must be maintained (and, moreover, should be more strenuously applied). An unconditional amnesty for acts of torture is unacceptable. Additional arrests, ongoing detentions and trials should respect the standards laid down under international law.

A truth and reconciliation initiative cannot operate at the level of civil society or traditional justice only. The authorities (at the level of the legislative, executive and judicial power) should at least give their support and recognise the authority of this initiative.

A truth and reconciliation initiative must remain independent from the public administration and political actors. This has several consequences at the level of the composition of an initiative as well as at the level of its mandate, operation, financing and reporting.[1714]

Information and the wider involvement of the Rwandan population are required.[1715] The civil society and "respectable" political opposition movements should be allowed to work and should be invited, from the start, to participate in the elaboration of the truth and reconciliation initiative.

In the Rwandan context, it seems inevitable that the international community would participate in an active manner in such an initiative. In addition to the UN 15-years' mission for reconciliation and reconstruction in Rwanda, a comparative study of successes and failures of the international Truth Commission in El Salvador would be highly desirable.

[1714] Recommendations 2 and 3 correspond to what Hayner summarises as "*political backing and operational independence*" (Hayner, P., Lessons from the Past: Thirteen Truth Commissions, p.174).

[1715] Some eyewitnesses have denounced the enormous distance between the population and the judicial approach at the level of the ICTR: "*They are incapable of approaching those who have experienced the genocide. They do not know how to ask the right questions. They have a behaviour and opinions that hurt people. The Rwandans had placed great hope in the ICTR. They are very disappointed*". (Sibomana, A., *Gardons espoir pour le Rwanda*, Paris, 1997, p.166).

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Its mandate should cover violations committed by the former government and the former opposition, as well as the current government and the current armed opposition. The example of the Truth and Reconciliation Commission in South Africa is of enormous value. Its objective is to achieve national unity and reconciliation through the work it is mandated to do, which work includes investigations into gross violations of human rights, the granting of amnesty for acts, omissions and offences associated with political objectives and the recommendation of measures for the restoration of the human and civil dignity of the victims. Some of these issues would apply in *mutatis mutandis* Rwanda.

The initiative should include elements such as investigations and reconstruction of events, the identification and prosecution of (some of) those responsible, redress and compensation of victims, as well as prevention. The judicial and non-judicial approaches should be combined. One could, for example, exclude the purely non-judicial approach for those crimes that fall under Category one as defined by the Organic law of 30 August 1996 (planners, instigators, supervisors and leaders of the genocide and other crimes against humanity).

Truth telling is a *sine qua non* prerequisite for any measures of pardon. Releasing detainees on the basis of their age or their health may be justified for humanitarian reasons, but do not do justice if the truth concerning the role which these persons played remains unknown. Does this explain in part, the protests of some survivors[1716] against these releases?

Measures which preclude the discovery of the truth and which impede inquiries or the identification of perpetrators are unacceptable. On the contrary, solutions could be adopted at the level of execution of sentences or in the form of a pardon or alternative sanctions.[1717]

Unlike in other instances, the pressure of time unfortunately is an important factor in the Rwandan context. The current detentions make a non-judicial approach urgent.

[1716] According to official sources, 48 former prisoners who were released in December 1997 and January 1998 would have been killed. The majority were in the Butare prefecture. (AFP, *Des prisonniers libérés assassinés dans le sud du Rwanda*, 6 January 1998, and REUTERS, *Rwandans kill 24 genocide suspects in mob justice*, 3 February 1998). Towards 15 October 1997, 1,239 persons would have been liberated because of the decision of the government to free presumed *génocidiares* who: were ill, old, minors or did not have a dossier (UNHRFOR, *Preliminary information on the human rights situation and activities of HRFOR in October 1997*). There were also demonstrations in *Gikongoro* in November 1997 (UN DHA IRIN, *Update n° 297 for Central and Eastern Africa*, 21 November 1997).

[1717] "*Punishment is negotiable - the Truth is not*". (Werle, G., "Without truth, no reconciliation. The South African Rechtsstaat and the Apartheid past" in *Verfassung und Recht Uebersee*, n° 1, 1996, p.72).

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The point of view of some national and international actors regarding a truth and reconciliation initiative has been summarised. The international community is reproachful in the domain of justice. The tribunal this international community has put in place to try those responsible for genocide and crimes against humanity has not (yet) met the expectations of the Rwandan population. Nevertheless, the present situation is too serious to refuse high priority to the development of a complementary non-judicial approach. Donors should seize the opportunity of a round table conference, a thematic consultation, bilateral negotiations or diplomatic initiatives, to get this process to develop further.

Another point of consideration is the economic situation. The question is whether or not democracy is sustainable under the current conditions of economic crisis in Rwanda. There is a notion that poor economic conditions will make it difficult for democracy to take root. The poor will make demands that the State cannot meet. Military elites, no longer receiving the privileges they had during easier times, will turn on elected leaders and remove them from office. Given the long-established tide of regionalism and ethnic particularism, both ethnic communities are likely to perceive political power in zero sum ways and thus continue interethnic competition for State power. What then can be done for the success of the democratization process? The democratic transition cannot be held hostage by the economic situation. For it is only by dealing effectively with four other variables that economic conditions may improve and thus increase the chances for social democracy. Democracy as a moral imperative, a social process, and a political practice is not incompatible with low levels of economic development. However limited they might be with respect to fundamental human rights, the democratic experiences of Botswana and Mauritius, are there to bear witness to this.[1718]

Democracy will not be handed down to the people of Rwanda on a silver plate. It can be realized only through sustained political struggle. Democracy indeed is the main result of this struggle. It is the ultimate prize won by a determined people who are committed to improving their lives economically and socially. Democracy is, above all, a moral imperative for any people who care about their dignity as human beings. It is a continuous social process of expanding political space in the interest of all, particularly the popular masses. And it is a political practice that empowers people to rise up against a decadent or oppressive political order to replace it with one likely to improve their material conditions of life and ensure a better future for their children.

[1718] See Du Toit, State-building and democracy in Southern Africa, 27.

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The second suggestion is that the reconstructed State should embody the following principles: fidelity to rules, respect for human rights, responsible politics, efficient and sustainable management of resources, and transparent government. Several paradigms are implicit in this statement of principles. Four of these merit elucidation.

The first concerns the relationship between form and content in Constitution making. One of the fundamental fallacies at independence was the assumption that the form in which the Constitution was drawn would, in and itself, generate normative responses. The constitutional format must be based on or embody shared values; not attempt to create them. The converse dilemma is whether minority protection has any place in the Rwandan democratic system. Should popular will *per se*, expressed at periodic elections, be sufficient reason for overriding minority interests?

In Rwanda where ethnicity or some variant thereof is an important political factor, this dilemma is very real. In the first instance every ethnic group can, if it wanted to, claim minority status depending on the configuration, at any point in time, of other groups within the same polity. What is the popular will or majoritarian opinion is, therefore, equally elusive. The basic tenet of democracy that gives pride of place to 'popular sovereignty' is therefore problematic in Rwanda.

The second implicit paradigm concerns the relationship between institutions and processes. Fidelity to rules as an essential element of constitutional government having failed to develop in Rwanda, there is doubt whether institution building *per se*, can generate dynamic processes as they interact with social forces. Indeed actors in the reconstruction process may denounce existing structures and demand, instead, that legitimate processes be put in place even if on an informal basis only, before institutional arrangements designed to administer them are established.

The third paradigm relates to the relationship between political behavior and the management of public affairs, including the economy. One of the earliest misconceptions in economic planning and plan administration was, that State control was the most effective means of achieving rapid economic development. The corollary to that was that without economic development, political and social rights were meaningless or in any event, impossible to attain. This argument is not only widely discredited globally, but is also an essential cause of Rwanda's underdevelopment. What protagonists of the reconstitution process should advocate is that the arena of politics must first be cleaned if development is to occur. In other words, the need for what *Okoth-Ogendo* calls 'political hygiene'[1719] (or good governance) should be seen as a pre-requisite to sustainable development not merely of the economy but of public affairs in general.

[1719] Okoth-Ogendo, H.W.O., 'Constitutionalism without constitutions' *in* Zoetbout, C.M. et al. (eds.), Constitutionalism in Africa – A quest for autochthonous principles, Gouda: Sandars, 1996, p. 60.

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By 'political hygiene' is meant a condition in which governing elites accept as a basis for decision-making, certain fundamental principle of political conduct, among which are equity, fair play, responsiveness to public need and public good, transparency and respect for human rights and freedoms. That political conduct in Rwanda has been devoid of these principles requires no documentation. Developments in the last years do indicate that political hygiene is yet a major item in Rwanda's agenda for social, political and economic reconstruction. The hindrance of plural politics is one of the main proofs. The other is the lack of shift in public discourse from leadership paradigms that emphasize the centralization of power in executive organs of government to those that are designed to encourage and legitimize public participation through organs of civil society. In other words, the State is still seen as an overlord, a bureaucratic maze that excludes all public scrutiny. It should rather be seen and indeed act as a trustee of the public good, hence should, in that context work in tandem with other social forces.

The fourth paradigm relates to the relationship between the search for autochthony and the fact that certain principles of constitutional behavior and democratic practice now exist as universal principles. While the search for endogenously propelled constitutional arrangements and principles must remain an important and legitimate concern in the reconstruction of the Rwandan State, this must not be taken to levels where protagonists believe that totally new and novel values and structures good only for Rwanda are possible. Indeed one of the strongest planks in the reconstruction process should be the recognition that the search for autochthony must be tempered by universal principles.

What emerges from the above presentation is that the process of reconstruction of the Rwandan State is concerned more with values than structures; with political conduct than with sterile institution building. The basic argument is that without commitment to constitutional and democratic values, constitutional arrangements, *per se* will remain exogenous to society.

It is understood, of course, that whatever values are accepted, as a basis of governance in the reconstituted Rwandan State must, ultimately, be embodied in appropriate institutions and structures. But that stage, reached too quickly, might lead Rwanda back to the paradox of earlier constitutional arrangements. Social forces and structures should be encouraged and strengthened through education and offered infrastructural support. It is the author's view that only after the paradigms implicit in the reconstruction process have become the common currency of society will the promulgation of a new and written Constitution make sense.

In this regard, the bill of rights must be negotiated and re-drafted along the lines suggested in Chapter three. The list of rights should be expanded to provide for freedom of the press, to provide for the right of Rwandan citizens to vote in an election of Members of Parliament and to be qualified

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for membership therein or to elect or be elected President of the Republic. In addition, the Constitution should specifically make provision for the application of all International Human Rights Instruments Rwanda has ratified or acceded to. Moreover, the Constitution should provide that the following provisions can only be amended through a referendum in which 75% of the voters approve, provided that arrangements are made for the respect of the rights of minorities: the bill of rights; the provisions guaranteeing a multi-party system of government and universal adult franchise. This will restrain any government that has an overwhelming majority of seats in Parliament from amending these crucial provisions at will, as has often happened during the period under study. The Constitution should also incorporate Directive Principles of State Policy along the Indian model.

Third, as the issue really is State power, the vast appointment powers vested in the President should be reduced and subjected to more effective checks. For example, most of the Presidential appointments to the cabinet, statutory corporations and senior civil service posts should be ratified by the legislature.

Fourth, as regards the judiciary, the *Conseil Supérieur de la Magistrature* should become a truly independent body, not one dominated by the RPF's political appointees, as at present. Appointment of judges to the *Tribunal de Première Instance*, the Court of Appeal and the Supreme Court should be a three-step process. First the *Conseil Supérieur de la Magistrature* should recommend a plurality of candidates for the position of judge to the President. Second, the President should then nominate one of the candidates and submit his or her name to the legislature for ratification. Third, before confirmation the legislature should, as in the United States of America hold public hearings at which members of the public can express their opinion on the candidate's suitability for holding high judicial office. In this way the appointed judges will enjoy the confidence of the executive, the legislature and, more importantly, of members of the public. It is obvious that people will only invoke the judicial machinery in order to assert their rights if they have confidence in the competence and impartiality of the judges. Rwandan people have had little confidence in the judiciary, partly because of the manner in which the judges were appointed, as well as the questionable calibre and impartiality of many of the judges. There is need for the judiciary to assert itself and be active with regard to the protection of human rights. As was indicated elsewhere in this dissertation, the judiciary has taken a low profile in politically sensitive cases and is far from asserting itself, partly because there is no evidence that autocracy is on the way out. Without an active judiciary determined to protect human rights, the bill of rights, no matter how well it may be written, will be utterly useless.

Fifth, the legal profession needs to play a more active role in: human rights education; protecting

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human rights violations and the enactment of laws that undermine human rights; assisting indigent people with legal services, as well as other victims of the government. The newly created Bar in Rwanda has acquiesced in the oppression of the people by remaining silent in the face of serious violations of human rights. Rwandan lawyers need to do more to educate the public about their rights, to offer legal assistance to the poor and to strongly protest government laws and practices that are likely to undermine human rights. There also is a need to reorganise legal education in order to improve the training of lawyers. There is need for well-defined postgraduate programmes at the Law Faculty of the National University of Rwanda. The Law Faculty curriculum needs to be expanded to incorporate, *inter alia,* human rights courses and a legal aid clinic, so that students are introduced to human rights issues and gain practical experience in solving legal problems of the poor at an early stage. The method of instruction, as suggested earlier, must emphasise creativity and critical thinking rather than the memorisation of legal rules, and must also incorporate policy arguments. If lawyers are trained better, they will be able to argue or (as judges) decide human rights cases much more effectively than has been the case hitherto.

Sixth, there is need to make the Human Rights Commission free from ethnic colouration and to entrust it with wide powers to receive complaints, to investigate human rights violations, and to pursue legal proceedings to enforce human rights. This should be set up along the lines suggested in Chapter three. In addition, the institution of the Ombudsman should be created and expanded, both in terms of personnel and geographical location. The Ombudsman should be accountable to the legislature and not to the President and should enjoy complete autonomy in its operations. It should also have power to enforce its decisions, unlike in some countries where it can only make non-binding recommendations to the President. Furthermore, there should be a Department of Legal Aid, adequately funded, expanded and decentralised so that it may play a more effective role in protecting human rights.

Seventh, the President's - and the Vice-President's - enormous security powers need to be curtailed along the lines suggested in Chapter two. Indeed, in addition to a strong judiciary, other measures are necessary to ensure protection of individual liberty. The Constitution should define what constitutes an emergency and the circumstances in which it can be declared as precisely as possible. It is suggested that a state of emergency should only be declared during periods of war, rampant rioting, mutiny and insurrection. Moreover, a state of emergency should be of limited duration as there is a danger of it degenerating into an instrument of tyranny and oppression if continued beyond the contingency that gave rise to it.

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Although the power to declare an emergency resides in the executive, it is submitted that such declaration should be approved within a short period (for example three days) by Parliament and should also be subject to frequent review by Parliament after a period of, say one month. It should expire after one month unless it has been extended by Parliament.

The power to detain should be exercised only when there is clear and present danger to national security. There should be a sufficiently proximate and rational relationship between the detainee's activities and national security. It should not be used as an easy substitute for inadequate criminal laws.

It is submitted that detainees should be provided with reasonable constitutional safeguards. The safeguards provided under the Ghana Constitution of 1979 offer the best model to date.[1720] Under Article 34 (1) of that Constitution a detainee is entitled to the following safeguards [omitting those that are contained in Rwandan law):

> (a) detailed grounds of detention in writing must be supplied within twenty-four hours of the commencement of the detention; b) the spouse, parent, child or other available next of kin must be informed of the detention within 24 hours and be permitted access to the detainee within seventy two hours of the commencement of the detention; c) a notification of the detention giving particulars of the relevant provisions of law and the grounds of his detention must be published in the gazette within ten days; d) his case shall be reviewed not more than 10 days after the commencement of his detention and thereafter at intervals of three months by a Tribunal composed of at least three Supreme Court Judges appointed by the Chief Justice and presided over by the Chief Justice of a Supreme Court Justice. The Review Tribunal has power to order the release of the detainee and the payment to him of adequate compensation.[1721]

Furthermore, the Ghana Constitution under Article 34 (3) requires the executive to make monthly reports to Parliament of the number of people detained and the number of cases in which it has acted in accordance with the decision of the Review Tribunal. These provisions, if incorporated in the Rwandan Constitution and if authorities respect them, would protect the rights of detainees.

The Constitution should prescribe the maximum period of detention. In India, for example, a detainee cannot be detained for more than three months unless an Advisory Committee approves the detention but even in such a case, a detainee must be released at the expiration of one year unless

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[1720] The Constitution of Ghana Act 1979, reprinted in Hins, N., The constitutions of 5 States compared, Nairobi: Djima, 1990, p. 21-30.

[1721] Id., art. 34 (2).

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convicted.[1722] In Rwanda, it is common to find people who have been interned for over five years, if they have not been assassinated or starved in prison. As far as the state of emergency is concerned, it is not clear how a person could still constitute a threat to public security after having been detained for such a long time.

Eighth, the public has to be made fully aware of its rights and the means of enforcing their rights through the various education devices suggested in Chapters two and three. The effective protection of human rights does not rest on fine laws and institutions alone but on whether the people are willing and able to utilise them to challenge human rights violations. As Justice *PT Georges* aptly said,

> In the final analysis, the only safeguard is an alert public opinion, quick to show its resentment when restrictive measures are proposed which are not reasonably justified in a democratic society.[1723]

The press can, and should, play a significant role in raising public awareness, and exposing and criticising human rights violations.

Finally, the various economic and social problems identified in this study need to be addressed. As long as massive poverty and the inequitable distribution of the country's resources remain, a large part of the population will have little chance for exercising their civil and political rights in any meaningful manner.

To sum up, what is needed for the success of international human rights standards and the rule of law in Rwanda is a combination of a variety of devices and measures. The implementation of many of the recommendations made above would require a vast sum of money and commitment. But freedom and justice for all do not usually come cheap.

[1722] Preventive Detention Act 1950, (11A). In Malaysia 2 years is the maximum permissible period under par. 8 of the Security Act 1960, 3 years is the maximum period of detention in Singapore under the Preservation of Public Security Ordinance, as amended.

[1723]Georges, PT, The Rule of Law: Definition and Safeguards in Law and its Administration in One-Party State: Selected Speeches of Telford Georges, Mimeo, Faculty of Law, University of Dar-es-Salaam, 1984, p. 39.

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